Supreme Court of the United States

OCTOBER TERM, 1963

No. 113

HON. CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS, PETITIONER,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13902

MINNESOTA MINING AND MANUFACTURING COMPANY,
PETITIONER

vs.

HON. CASPER PLATT, Chief Judge, United States District Court, Eastern District of Illinois, RESPONDENT

Petition for Writ of Mandamus

PETITIONER'S APPENDIX FILED SEPTEMBER 15, 1962

RESPONDENT'S APPENDIX FILED NOVEMBER 1, 1962

[fol. 1]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

Criminal Action No. 61-78-D
(15 U.S.C. §§ 1 and 2)

UNITED STATES OF AMERICA

v.

MINNESOTA MINING AND MANUFACTURING COMPANY, DEFENDANT

INDICTMENT—December 13, 1961

The grand jury charges:

COUNT ONE.

I.

DEFENDANT.

1. Minnesota Mining and Manufacturing Company (hereinafter referred to as "Minnesota") is hereby indicted and made a defendant herein. Minnesota is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in St. Paul, Minnesota.

II.

TRADE AND COMMERCE.

2. Minnesota is a manufacturer and seller of a broad range of products. It has grown rapidly, having increased its annual sales from $4,550,010 in 1931 to $549,675,178 in 1960 and having increased its assets from $5,573,404 in 1931 to $447,258,553 in 1960.

3. Among the products made and sold by Minnesota is pressure sensitive tape, which term, as used herein, shall mean any adhesive product which includes a backing of sheet or film of non-fibrous or unwoven fibrous material, [fol. 2] or both, with a pressure sensitive adhesive materi-

al applied to any portion of a surface of said backing element (but the term shall not include products manufactured and distributed for surgical or medical purposes). Pressure sensitive tape adheres to an object upon contact under slight pressure and does not require moistening. Under the broad name, "Scotch," Minnesota sells various types of pressure sensitive tapes such as cellophane, paper masking, vinyl plastic, filament or strand laminated, and acetate fiber tapes. Said products are sometimes referred to hereinafter as "tapes."

4. Pressure sensitive tape first came into extensive use in this country about 1927, after an introduction of spray painting of automobiles had created a large demand for a masking tape. For the covering of surfaces not to be painted, paper masking tape proved superior to the cloth tape then in use. As spray painting increased and as other uses for the product were discovered, such as protecting objects during shipment, attaching labels, etc., paper masking tape sales grew rapidly, and today this type of tape accounts for the largest volume of sales of all varieties of pressure sensitive tape. Transparent cellophane tape came into use in the early 1930's and was immediately applied for numerous purposes such as sealing packages, repairing articles, printing labels, etc. Its popularity increased to a point where it now is the second largest seller among pressure sensitive tapes.

5. During the 1940's, a waterproof combination tape, which combined other backings with an acetate film, was employed for heavier duty use, such as carton sealing and splicing. This tape was called acetate fiber and it continues to enjoy substantial use. Another tape, the sale of which has grown rapidly since the late 1940's, is vinyl plastic tape. This tape has largely displaced friction, or "bicycle" tape, where insulation from electricity is desired [fol. 3] and also has become an all-purpose tape. In the 1950's, filament or strand laminated tape, which is a tape strengthened with numerous parallel strands of threads, was employed to wrap and seal heavy cartons and packages. Made with a backing of paper or acetate film and with threads of either rayon, nylon or glass fiber, it began displacing steel strapping on boxes or cartons.

Filament tapes are widely employed in transporting or storing goods where high strength is required.

6. The above described tapes as well as other pressure sensitive tapes of lesser use are practically indispensable to industrial concerns, Government agencies, offices, stores, and the general public for a host of purposes. Since 1927, this industry has grown until its annual sales volume in the United States in 1960 amounted to approximately $175,000,000. Minnesota is and has been since 1927 by far the largest manufacturer and seller of pressure sensitive tapes in the United States and its 1960 sales of such products exceeded $100,000,000.

7. During the period of time covered by this indictment, Minnesota has engaged in the manufacture of pressure sensitive tapes at plants located in the States of Illinois, Minnesota and Pennsylvania. During this period, Minnesota has solicited and received orders for pressure sensitive tapes from customers located in States other than those where its plants were located and in foreign countries and, pursuant to such orders, has sold and shipped substantial amounts of such products to said customers located in other States of the United States and in foreign countries. Thus, during the period of time covered by the indictment, there was a regular, continuous and substantial flow of said tapes from Minnesota's plants to customers located in other States of the United States and in foreign countries.

[fol. 4]

III:

Offense Charged.

Attempt to Monopolize.

8. Beginning in or about 1931, the exact date being to the grand jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendant and others to the grand jurors unknown have been engaged in an attempt to monopolize the above described interstate and foreign trade and commerce in the manufacture and sale of pressure sensitive tapes in violation of Section 2 of the Act of Congress of July 2,

1890 (15 U.S.C. § 2), commonly known as the Sherman Act.

9. Pursuant to and in furtherance of the aforesaid attempt to monopolize, defendant has done, among other acts, the following:

(a) Embarked upon a program of controlling the tape industry by systematically coercing competitors to accept patent license agreements, which would give Minnesota domination over the competitors' manufacture and sell, by suing or threatening to sue for infringement of United States Letters Patent;

(b) Required or attempted to require its competitors to enter into patent license agreements with Minnesota containing some or all of the following restrictive terms and conditions:

(1) Minnesota could fix and establish the minimum prices, most favorable terms of sale, the classes of buyers, the types of tape which could be manufactured, and the manner of making and distributing the tape; the licensee would be prohibited from making or distributing under the agreement except as specified by Minnesota;

[fol. 5] (2) The rate of royalty payable to Minnesota would increase as licensee's sales increase;

(3) Licensee would be prohibited from selling tape under a brand name other than its own or from selling to a customer, knowing the tape would be resold under a private brand name;

(4) Licensee would be required to assist Minnesota in any patent litigation against others by giving testimony and other evidence;

(5) Licensee could be required to give Minnesota a royalty-free license under any patent relating to tape that licensee obtained which was dominated by Minnesota's patents relating to tape, and, when licensee's patent was not so dominated, Minnesita could demand a license under the same terms contained in the existing agreement;

(6) Licensee would be prohibited from exporting tape or selling to those whom it knew would export, and licensee would mark tape with language similar to the following: "Licensed for use in the United States only and not to be exported";

(7) Licensee would be barred from selling tape in specified fields of use;

(8) Licensee would be prohibited from manufacturing sandpaper;

(9) Any customer to whom Minnesota sells a private label tape would be required to adhere to the minimum prices and terms of sale referred to in subparagraph (1) hereof;

(10) Licensor, upon licensee's demand, would sue an unlicensed tape competitor for patent infringement, with licensee sharing expenses of litigation;

[fol. 6] (c) Sought to eliminate actual and potential competition with respect to tape through the prosecution or threat of patent infringement suits;

(d) Agreed with Johnson & Johnson (hereinafter refered to as "J & J") to refrain from the manufacture and sale of surgical tape so long as J & J refrained from the manufacture and sale of sandpaper;

(e) Agreed with Minnesota's competitors to fix and maintain uniform and non-competitive prices and terms of sale, the classes of buyers, the types of tapes which could be manufactured, and the manner of making and distributing such products;

(f) Acquired or attempted to acquire the ownership or assets of tape competitors, customers, or suppliers of tape manufacturers in order to eliminate or foreclose competition;

(g) Assigned certain patent applications on filament tape to J & J and thereafter took a patent license agreement with J & J as the licensor, under which, among other things:

(1) Minnesota was granted a preferential royalty rate substantially lower than that offered to Minnesota's competitors;

(2) Upon Minnesota's demand, J & J was required to sue infringers with Minnesota sharing the costs of litigation, and Minnesota agreed to assist J & J in any patent litigation;

(3) J & J determined the types of licensed products that could be made and their manner of manufacture, and Minnesota agreed not to manufacture such products other than as specified by J & J;

(4) Minnesota would not sell a private label tape unless J & J did so;

[fol. 7] (5) Minnesota could be required to give J & J a royalty-free license under any patent Minnesota obtained which was dominated by J & J's patents, and when Minnesota's patent was not so dominated, J & J could demand a license under the same terms and conditions contained in the existing agreement.

IV.

Effects.

10. The aforesaid offense in the industry described has had, among other things, the following effects:

(a) Federal and State agencies, industrial concerns, educational institutions, distributors, retailers, the general public, and others have been deprived of the benefits of free and open competition in the development, manufacture, and distribution of tapes;

(b) Actual and potential competition in the tape industry has been excluded, eliminated and curtailed;

(c) Manufacturers of tape have been subjected to restrictions and restraints in manufacturing and selling tape which impaired their ability to compete with Minnesota;

(d) The progress of science and the useful arts has been discouraged and hampered, and the patent laws of the United States have been used for purposes inconsistent with their constitutional basis;

(e) Interstate and foreign commerce in tape has been substantially and unreasonably burdened and impeded.

V.

JURISDICTION AND VENUE.

11. The offense charged in this count of this indictment has been carried out in part within the Eastern District [fol. 8] of Illinois and within the jurisdiction of this Court. During the period of time covered by this count of this indictment, and within five years preceding the return thereof, Minnesota has performed acts within the Eastern District of Illinois in furtherance of the offense hereinabove described.

COUNT TWO.

12. The allegations contained in paragraphs 1 through 7 of this indictment are here realleged with the same force and effect as though set forth in full.

VI.

CO-CONSPIRATORS.

13. Various corporations and individuals not made defendants herein have participated as co-conspirators with the defendant in the offense charged in this count of this indictment and performed acts and made statements in furtherance of said offense. Said co-conspirators, some of them being known to the grand jurors and others being to the grand jurors unknown, include among them the following listed corporations, each of which is organized and existing under the laws of the State designated:

Name of Corporation	State of Incorporation	Principal Place of Business
Johnson & Johnson	New Jersey	New Brunswick, N. J.
Permacel-LePage's, Inc.	New Jersey	New Brunswick, N. J.
Permacel Tape Corporation	New Jersey	New Brunswick, N. J.
Industrial Tape Corporation	New Jersey	New Brunswick, N. J.
The Revolite Corporation	New Jersey	New Brunswick, N. J.
The Kendall Company	Massachusetts	Boston, Massachusetts
Norton Company	Massachusetts	Worcester, Massachusetts
The Seamless Rubber Company	Connecticut	New Haven, Connecticut
Johns-Manville Corporation	New York	New York, New York

[fol. 9]

VII.

OFFENSE CHARGED.

Combination and Conspiracy in Restrain of Trade.

14. Beginning in or about 1933, the exact date being to the grand jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendant and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate and foreign trade and commerce in pressure sensitive tapes in violation of Section 1 of the Act of Congress of July 2, 1890 (15 U.S.C. § 1), commonly known as the Sherman Act.

15. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendant and co-conspirators, the substantial terms of which have been and are that they agree:

(a) To fix, establish and maintain the minimum prices and most favorable terms of sale, the classes of buyers, the types of pressure sensitive tapes to be made, and the manner of making and distributing such tapes;

(b) To amass patents relating to pressure sensitive tapes for the purpose of coercing competitive manufacturers and sellers into signing restrictive license agreements or excluding them from the pressure sensitive tape industry;

(c) To exclude actual and potential competitive manufacturers and sellers from the pressure sensitive tape industry through patent infringement suits or threats thereof, licensees to give testimony in licensor's behalf in such suits;

(d) To restrict export sales of pressure sensitive tape in competition with Minnesota.

[fol. 10] 16. In effectuating and carrying out the aforesaid combination and conspiracy, the defendant and co-conspirators by agreement, understanding and concert of action have done the acts which, as hereinbefore alleged, they agreed to do.

VIII.

EFFECTS AND JURISDICTION AND VENUE.

17. The allegations contained in paragraphs 10 and 11 are here realleged with the same force and effect as though set forth in full.

COUNT THREE

18. The allegations contained in paragraphs 1 through 7 and paragraph 13 of this indictment are here realleged with the same force and effect as though set forth in full.

IX.

OFFENSE CHARGED.

Combination and Conspiracy to Monopolize

19. Beginning in or about 1933, the exact date being to the grand jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendant and co-conspirators have engaged in a combination and conspiracy to monopolize the aforesaid interstate and foreign trade and commerce in pressure sensitive tapes in violation of Section 2 of the Act of Congress of July 2, 1890 (15 U.S.C. § 2), commonly known as the Sherman Act.

20. The allegations contained in paragraphs 15 and 16 are here realleged with the same force and effect as though set forth in full.

[fol. 11]

X.

EFFECTS AND JURISDICTION AND VENUE.

21. The allegations contained in paragraphs 10 and 11 are here realleged with the same force and effect as though set forth in full.

COUNT FOUR.

22. The allegations contained in paragraphs 1 and 2 of this indictment are here realleged with the same force and effect as though set forth in full.

23. Among the products made and sold by Minnesota are magnetic recording media, which term, as used herein, shall mean any product composed of magneticaly susceptible ferromagnetic iron oxide coated on, dispersed within, or otherwise disposed in contact with, non-magnetic material such as plastics, paper, cloth, or any other non-magnetic solid material. Such products are sometimes referred to hereinafter as "media." Magnetic recording media, such as the tape used on a tape recorder, first came into general use in this country about 1946, when magnetic sound recordings were being made through use of wire and wire recorders. It was quickly recognized that tape recording was superior to wire recording and, as sales of tape recorders increased, so also did the sales of magnetic recording tape. More recently, various tapes and other kinds of media have been employed in high-speed recording of various signals in the fields of rocketry, ballistic missiles, and space vehicles, as well as in data processing and memory recording. Another application of such media is the use of video tapes for transcriptions and telecasting of sound and pictures. Industry sales of magnetic recording media in the United States have mounted rapidly, reaching a total of approximately $40,000,000 in 1960. Minnesota is and has been since 1947 by far the largest manufacturer and seller of media in the United States, and its 1960 sales surpassed $25,000,000.

[fol. 12] 24. Throughout the period of time covered by this indictment, Minnesota has engaged in the manufacture of magnetic recording media at a plant located in the State of Minnesota. During this period, Minnesota has solicited and received orders for media from customers located in States other than the State where its plant was located and, pursuant to such orders, has sold and shipped substantial amounts of such products to said customers in other States of the United States. Thus, during the period of time covered by the indictment, there was a regular, continuous, and substantial flow of such media from Minnesota's plant to customers located in other States of the United States.

XI.

OFFENSE CHARGED.

Attempt to Monopolize

25. Beginning in or about 1946, the exact date being to the grand jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendant and others to the grand jurors unknown have been engaged in an attempt to monopolize the above described interstate and foreign trade and commerce in the manufacture and sale of magnetic recording media in violation of Section 2 of the Act of Congress of July 2, 1890 (15 U.S.C. § 2), commonly known as the Sherman Act.

26. Pursuant to and in furtherance of the aforesaid attempt to monopolize, defendant has done, among other acts, the following:

(a) Embarked upon a program of controlling the media industry by systematically coercing competitors to accept patent license agreements, which would give Minnesota domination over the competitors' manufacture and sale, by suing or threatening to sue for infringement of United States letters patent;

[fol. 13] (b) Attempted to require its competitors to enter into patent license agreements with Minnesota containing some or all of the following restrictive terms and conditions;

(1) Minnesota could fix and establish the minimum prices, most favorable terms of sale, the classes of buyers, the types of media which could be manufactured, and the manner of making and distributing the media; the licensee would be prohibited from making or distributing under the agreement except as specified by Minnesota.

(2) Licensee would be prohibited from selling the media under a brand name other than its own or from selling to a customer, knowing the media would be resold under a private brand name;

(3) Licensee would be required to assist Minnesota in any patent litigation against others by giving testimony and other evidence;

(4) Licensee could be required to give Minnesota a royalty-free license under any patent relating to media that licensee obtained which was dominated by Minesota's patents relating to media and, when licensee's patent was not so dominated, Minnesota could demand a license under the same terms contained in the existing agreement;

(5) Licensee would be prohibited from exporting media or selling to those whom it knew would export, and licensee would mark the media with language similar to the following: "Licensed for use in the United States only and not to be exported";

(6) Licensee would be barred from selling media in specified fields of use.

(c) Sought to eliminate actual and potential competition with respect to media through the prosecution or threat of patent infringement suits;

[fol. 14]

(d) Induced Armour to attempt to eliminate any existing rights of others to operate under the patents or patent applications licensed to Minnesota and to give to Minnesota Armour's technical information and knowledge concerning media while denying said information and knowledge to all others.

XII.

Effects.

27. The aforesaid offense in the industry described has had, among other things, the following effects:

(a) Federal and State agencies, industrial concerns, educational institutions, distributors, retailers, the general public, and others have been deprived of the benefits of free and open competition in the development, manufacture and distribution of media;

(b) Actual and potential competition in the media industry has been excluded, eliminated and curtailed;

(c) Manufacturers of media have been subjected to restrictions and restraints in manufacturing and selling media which impaired their ability to compete with Minnesota;

(d) The progress of science and the useful arts has been discouraged and hampered, and the patent laws of the United States have been used for purposes inconsistent with their constitutional basis;

(e) Interstate commerce has been substantially and unreasonably burdened and impeded.

XIII.

JURISDICTION AND VENUE.

28. The offense charged in this count of this indictment has been carried out in part within the Eastern District of Illinois and within the jurisdiction of this Court. During the period of time covered by this count of this indict- [fol. 15] ment, and within five years preceding the return thereof, Minnesota has performed acts within the Eastern District of Illinois in furtherance of the offense hereinabove described.

COUNT FIVE.

29. The allegations contained in paragraphs 1 to 2, 23 and 24 of this indictment are here realleged with the same force and effect as though set forth in full.

XIV.

CO-CONSPIRATORS.

30. Various corporations and individuals not made defendants herein have participated as co-conspirators with the defendant in the offense charged in this count of this indictment and performed acts and made statements in furtherance of said offense. Said co-conspirators, some of them being known to the grand jurors and others being to the grand jurors unknown, included among them Armour Research Foundation of Illinois Institute of Tech-

nology (hereinafter referred to as "Armour"), a non-profit corporation organized and existing under the laws of the State of Illinois with its principal place of business in Chicago, Illinois.

XV.

OFFENSE CHARGED.

Combination and Conspiracy in Restrain of Trade.

31. Beginning in or about 1947, the exact date being to the grand jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendant and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate and foreign trade and com-
[fol. 16] merce in magnetic recording media in violation of Section 1 of the Act of Congress of July 2, 1890 (15 U.S.C. § 1), commonly known as the Sherman Act.

32. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendant and co-conspirators, the substantial terms of which have been and are that they agree:

(a) To fix, establish and maintain the minimum prices and most favorable terms of sale, the classes of buyers, the types of media to be made, and the manner of making and distributing such media;
(b) To amass patents on media for the purpose of coercing competitive manufacturers and sellers into signing restrictive license agreements or excluding them from the media industry;
(c) To exclude actual and potential competitive manufacturers and sellers from the media industry through patent infringement suits or threats thereof, licensees to give testimony in licensor's behalf in such suits;
(d) Armour would use its other patents on recording devices as a means of requiring a licensee under such patents to purchase iron oxide powder from Minnesota for use only as specified by Minnesota;

(e) Armour would attempt to eliminate any existing rights of others to operate under the media patents or patent application licensed to Minnesota and would give Minnesota its technical information and knowledge concerning media while denying said information and knowledge to all others;

33. In effectuating and carrying out the aforesaid combination and conspiracy, the defendant and co-conspirators by agreement, understanding, and concert of action have done the acts which, as hereinbefore alleged, they agreed to do.

[fol. 17]

XVI.

Effects and Jurisdiction and Venue.

34. The allegations contained in paragraphs 27 and 28 of this indictment are here realleged with the same force and effect as though set forth in full.

Count Six.

35. The allegations contained in paragraphs 1, 2, 23, 24 and 30 of this indictment are here realleged with the same force and effect as though set forth in full.

XVII.

Offense Charged.

Combination and Conspiracy to Monopolize.

36. Beginning in or about 1947, the exact date being to the grand jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendant and co-conspirators have engaged in a combination and conspiracy to monopolize the aforesaid interstate and foreign trade and commerce in magnetic recording media in violation of Section 2 of the Act of Congress of July 2, 1890 (15 U.S.C. § 2), commonly known as the Sherman Act.

37. The allegations contained in paragraphs 32 and 33 of this indictment are here realleged with the same force and effect as though set forth in full.

XVIII.

Effects and Jurisdiction and Venue.

38. The allegations contained in paragraphs 27 and 28 of this indictment are here realleged with the same force and effect as though set forth in full.

[fol. 18]

Count Seven.

39. The allegations contained in paragraphs 1 and 2 of this indictment are here realleged with the same force and effect as though set forth in full.

40. Among the products made and sold by Minnesota are alumnium presensitized lithographic plates; which term, as used herein, shall mean any product composed of a thin substantially flat sheet of aluminum containing at least one surface of a light-sensitive hydrophobic-hydrophylic type coating. Such products are sometimes referred to hereinafter as "plates."

41. Lithography, one of the principal methods of printing, operates on the principle that grease and water are mutually repellant. Lithographic plates made of zinc or other materials have been used for many years, the printer applying chemicals to the surface preparatory to its use in order to make it light sensitive. The development of aluminum presensitized lithographic plates eliminated this costly and time-consuming operation on the printer's part, and such plates are now widely employed by printers and lithographers for printing runs usually of less than thirty thousand impressions. While some of the plates are prepared in special sizes for custom work, the bulk of them are made in sizes suitable for the popular printing presses. Since their introduction in this country beginning about 1948, said plates have enjoyed rapidly increasing sales in the United States, totalling approximately $17,500,000 in 1960. Minnesota is and has been since 1951 by far the largest manufacturer and seller of such plates in this country, and its 1960 sales of such products exceeded $11,000,000.

42. During the period of time covered by this indictment, Minnesota has engaged in the manufacture of aluminum presensitized lithographic plates at a plant located in

the State of Minnesota. Within this time, Minnesota has [fol. 19] solicited and received orders for plates from customers located in States other than the State where its plant was located and, pursuant to such orders, has sold and shipped substantial quantities of such plates to said customers located in other States of the United States. Thus, during the period of time covered by the indictment, there was a regular, continuous, and substantial flow of said plates from Minnesota's plant to customers located in other States of the United States.

XIX.

OFFENSE CHARGED:

Attempt to Monopolize.

43. Beginning in or about 1950, the exact date being to the grand jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendant and others to the grand jurors unknown have been engaged in an attempt to monopolize the above described interstate trade and commerce in the manufacture and sale of aluminum presensitized lithographic plates in violation of Section 2 of the Act of Congress of July 2, 1890 (15 U.S.C. § 2), commonly known as the Sherman Act.

44. Pursuant to and in furtherance of the aforesaid attempt to monopolize, defendant has done, among other things, the following:

(a) Embarked upon a program of controlling the plate industry by systematically coercing competitors to accept patent license agreements, which would give Minnesota domination over the competitors' manufacture and sale, by suing or threatening to sue for infringement of United States letters patent;

(b) Required or attempted to require its competitors to enter into patent license agreements with Min- [fol. 20] nesota containing some or all of the following restrictive terms and conditions:

(1) Minnesota could fix and establish the minimum prices, most favorable terms of sale, the classes of buyers, the types of plates which could be manufactured, and the manner of making and distributing the plates; the licensees would be prohibited from making or distributing under the agreement except as specified by Minnesota;

(2) The rate of royalty payable to Minnesota would increase as licensee's sales increased;

(3) Licensee would be prohibited from selling plates under a brand name other than its own or from selling to a customer, knowing the plates would be resold under a private brand name;

(4) Licensee would be required to assist Minnesota in any patent litigation against others by giving testimony and other evidence;

(5) Licensee could be required to give Minnesota a royalty-free license under any patent relating to plates that licensee obtained which was dominated by Minnesota's patents relating to plates, and when licensee's patent was not so dominated, Minnesota could demand a license under the same terms contained in the existing agreement;

(c) Sought to eliminate actual and potential competition with respect to plates through the prosecution or threat of patent infringement suits.

XX.

Effects.

45. The aforesaid offense in the industry described has had, among other things, the following effects:

[fol. 21] (a) Federal and State agencies, industrial concerns, educational institutions, distributors, retailers, the general public, and others have been deprived of the benefits of free and open competition in the development, manufacture, and distribution of plates;

(b) Actual and potential competition in the plate industry has been excluded, eliminated and curtailed;

(c) Manufacturers of plates have been subjected to restrictions and restraints in manufacturing and selling plates which impaired their ability to compete with Minnesota;

(d) The progress of science and the useful arts has been discouraged and hampered, and the patent laws of the United States have been used for purposes inconsistent with their constitutional basis;

(e) Interstate commerce in plates has been substantially and unreasonably burdened and impeded.

XXI.

Jurisdiction and Venue.

46. The offense charged in this count of this indictment has been carried out in part within the Eastern District of Illinois and within the jurisdiction of this Court. During the period of time covered by this count of this indictment, and within five years preceding the return thereof, Minnesota has performed acts within the Eastern District of Illinois in furtherance of the offense hereinabove described.

Count Eight.

47. The allegations contained in paragraphs 1, 2, 40, 41 and 42 of this indictment are here realleged with the same force and effect as though set forth in full.

[fol. 22]

XXII.

Co-Conspirators.

48. Various corporations and individuals not made defendants herein have participated as co-conspirators with the defendant in the offense charged in this count of this indictment and performed acts and made statements in furtherance of said offense. Said co-conspirators, some of them being known to the grand jurors and others being to the grand jurors unknown, include among them A. B.

Dick Company, a corporation organized and existing under the laws of the State of Illinois with its principal place of business in Niles, Illinois.

XXIII.

OFFENSE CHARGED.

Combination and Conspiracy in Restraint of Trade.

49. Beginning in or about 1958, the exact date being to the grand jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendant and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in aluminum presensitized lithographic plates in violation of Section 1 of the Act of Congress of July 2, 1890 (15 U.S.C. § 1), commonly known as the Sherman Act.

50. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendant and co-conspirators, the substantial terms of which are that they agree:

(a) To fix, establish and maintain the minimum prices and most favorable terms of sale, the classes of buyers, the types of plates to be made, and the manner of making and distributing such plates;

[fol. 23] (b) To amass patents relating to plates for the purpose of coercing competitive manufacturers and sellers into signing restrictive license agreements or excluding them from the plate industry;

(c) To exclude actual and potential competitive manufacturers and sellers from the plate industry through patent infringement suits or threats thereof, licensees to give testimony in licensor's behalf in such suits.

51. In effectuating and carrying out the aforesaid combination and conspiracy, the defendant and co-conspirators by agreement, understanding and concert of action have done the acts which, as hereinbefore alleged, they agreed to do.

XXIV.

Effects and Jurisdiction and Venue.

52. The allegations contained in paragraphs 45 and 46 of this indictment are here realleged with the same force and effect as though set forth in full.

Count Nine.

53. The allegations contained in paragraphs 1, 2, 40, 41, 42 and 48 of this indictment are here realleged with the same force and effect as though set forth in full.

XXV.

Offense Charged.

Combination and Conspiracy to Monopolize.

54. Beginning in or about 1958, the exact date being to the grand jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendant and co-conspirators have engaged in a combination and conspiracy to monopolize the aforesaid interstate trade and commerce in plates in violation of [fol. 24] Section 2 of the Act of Congress of July 2, 1890 (15 U.S.C. § 2), commonly known as the Sherman Act.

55. The allegations contained in paragraphs 50 and 51 of this indictment are here realleged with the same force and effect as though set forth in full.

XXVI.

EFFECTS AND JURISDICTION AND VENUE.

56. The allegations contained in paragraphs 45 and 46 of this indictment are here realleged with the same force and effect as though set forth in full.

A TRUE BILL

Dated: December 13, 1961

Will H. Hoover
DEPUTY FOREMAN

Earl A. Jinkinson
EARL A. JINKINSON

Lee Loevinger
LEE LOVINGER
Assistant Attorney General

Raymond P. Hernacki
RAYMOND P. HERNACKI

Harry G. Sklarsky
HARRY G. SKLARSKY
Attorney, Department of Justice

Theodore T. Peck
THEODORE T. PECK

Harry H. Faris
HARRY H. FARIS

Leon E. Lindenbaum
LEON E. LINDENBAUM

Attorneys, Department of Justice
Room 404, United States Courthouse
Chicago 4, Illinois
WEbster 9-2395.

[fol. 25]

IN UNITED STATES DISTRICT COURT

LAW OFFICES
SNYDER, CHADWELL, KECK, KAYSER & RUGGLES
135 South LaSalle Street
CHICAGO 3
RANDOLPH 6-2545

January 17, 1962

Mr. Earl A. Jinkinson
Chief, Midwest Office
Attorney Department of Justice
219 South Clark Street
Chicago 4, Illinois

Re: United States v. Minnesota Mining and Manufacturing Company (E.D. Ill.)
Criminal Case No. 61-73D

Dear Mr. Jinkinson:

As agreed in open court on December 28, 1961 we are writing this letter to request information to aid us in determining whether to file a motion to transfer the case from the Eastern District of Illinois under Rule 21(b) of the Federal Rules of Criminal Procedure, and likewise to ascertain whether any justification exists for venue within the Eastern District of Illinois.

First, we request that you make available for our examination the subpoenae duces tecum and subpoenae ad testificandum which were issued by grand juries sitting at Danville in connection with their investigation of the defendant from 1959 to the date of the indictment.

We shall also appreciate it if you will furnish us the following information with respect to each of these judicial districts:

(1) Eastern District of Illinois
(2) Northern District of Illinois
(3) District of Minnesota

[fol. 26] 1. As to paragraphs 8 and 9 of the indictment state whether the alleged attempt to monopolize was pursuant, in whole or in part, to a combination and conspiracy, if it was:

(a) State whether the supposed combination and conspiracy or any part thereof was formed in any one of the foregoing districts, and if so, in which district or districts.

(b) As to each thing intended to be alleged as having been done as alleged in paragraph 9 of the indictment, state the nature of each such thing done in each of the foregoing districts and the time and place in which done.

2. As to paragraphs 8 and 9 of the indictment if the alleged attempt to monopolize was not pursuant, in whole or in part, to a combination and conspiracy;

(a) State whether or not the defendant attempted to monopolize in any one of the foregoing districts and if so in which district or districts.

(b) As to each thing intended to be alleged as having been done as alleged in paragraphs 8 and 9 of the indictment, state the nature of each such thing done in each of the foregoing districts and the time and place in which done.

3. As to paragraphs 14 and 19 of the indictment state whether the supposed combination and conspiracy therein alleged, or any part thereof, was formed in any one of the foregoing districts, and if so in which district or districts.

4. As to paragraphs 15 and 16 of the indictment and as to said paragraphs as realleged in paragraph 20 of the indictment, as to each thing intended to be alleged as having been done as alleged in said paragraphs, state the nature of each such thing done in each of the foregoing districts and the time and place at which done.

[fol. 27] 5. As to paragraphs 25 and 26 of the indictment state whether the alleged attempt to monopolize was pursuant, in whole or in part, to a combination and conspiracy; if it was:

(a) State whether the supposed combination and conspiracy or any part thereof was formed in any one of the foregoing districts, and if so in which district or districts.

(b) As to each thing intended to be alleged as having been done as alleged in paragraph 26 of the indictment, state the nature of each such thing done in each of the foregoing districts and the time and place in which done.

6. As to paragraphs 25 and 26 of the indictment if the alleged attempt to monopolize was not pursuant, in whole or in part, to a combination and conspiracy:

(a) State whether or not the defendant attempted to monopolize in any one of the foregoing districts and if so in which district or districts.

(b) As to each thing intended to be alleged as having been done as alleged in paragraphs 25 and 26 of the indictment, state the nature of each such thing done in each of the foregoing districts and the time and place in which done.

7. As to paragraphs 31 and 36 of the indictment state whether the supposed combination and conspiracy therein alleged, or any part thereof, was formed in any one of the foregoing districts, and if so in which district or districts.

8. As to paragraphs 32 and 33 of the indictment, and as to said paragraphs as realleged in paragraph 37 of the indictment as to each thing intended to be alleged as having been done as alleged in said paragraphs, state the nature of each such thing done in each of the foregoing districts and the time and place at which done.

[fol. 28] 9. As to paragraphs 43 and 44 of the indictment, state whether the alleged attempt to monopolize was pursuant, in whole or in part, to a combination and conspiracy; if it was:

(a) State whether the supposed combination and conspiracy or any part thereof was formed in any one of the foregoing districts, and if so in which district or districts.

(b) As to each thing intended to be alleged as having been done as alleged in paragraph 44 of the indictment, state the nature of each such thing done in each of the foregoing districts and the time and place in which done.

10. As to paragraphs 43 and 44 of the indictment if the alleged attempt to monopolize was not pursuant, in whole or in part, to a combination and conspiracy:

(a) State whether or not the defendant attempted to monopolize in any one of the foregoing districts and if so in which district or districts.

(b) As to each thing intended to be alleged as having been done as alleged in paragraphs 43 and 44 of the indictment, state the nature of each such thing done in each of the foregoing districts and the time and place in which done.

11. As to paragraphs 49 and 54 of the indictment state whether the supposed combination and conspiracy therein alleged, or any part thereof, was formed in any one of the foregoing districts, and if so in which district or districts.

12. As to paragraphs 50 and 51 of the indictment and as to said paragraphs as realleged in paragraph 55 of the indictment, as to each thing intended to be alleged as having been done as alleged in said paragraphs, state the nature of each such thing done in each of the foregoing districts and the time and place at which done.

[fol. 29] 13. In addition to the foregoing please furnish the following:

As to Counts One, Two and Three of the indictment, identify the following persons, firms or corporations by name and state within which judicial district its principal place of business is located:

(a) Each competitor alleged to have been coerced to accept a patent license agreement as alleged in paragraph 9(a) of the indictment.

(b) Each competitor whom the defendant required or attempted to require to enter into the described patent license agreements with the defendant as alleged in paragraph 9(b) of the indictment.

(c) The actual or potential competitors of the defendant who were sued or threatened with suit as alleged in paragraph 9(c) of the indictment.

(d) The competitors who agreed with the defendant to do the things alleged in paragraph 9(e) of the indictment.

(e) The competitors, customers or suppliers of tape manufacturers, the ownership of whom or whose assets were acquired or attempted to be acquired by the defendant as alleged in paragraph 9(f) of the indictment.

(f) The competitive manufacturers or sellers who were coerced into signing agreements or excluded from the tape industry as alleged in paragraph 15(b) of the indictment.

(g) The competitive manufacturers and sellers who were excluded from the pressure sensitive tape industry by the means alleged in paragraph 15(c) of the indictment.

14. As to Counts Four, Five and Six of the indictment identify the following persons, firms or corporations by [fol. 30] name and state within which judicial district its principal place of business is located:

(a) Each competitor coerced into accepting patent license agreements by the means alleged or as otherwise alleged in paragraph 26(a) of the indictment.

(b) Each competitor of the defendant whom the defendant attempted to require to enter into patent license agreements as alleged in paragraph 26(b) of the indictment.

(c) The actual or potential competitors eliminated with respect to media as alleged in paragraph 26(c) of the indictment.

(d) Such persons, firms or corporations who had rights to operate under patents or patent applications of Armour licensed to defendant, whose rights under such patents or patent applications were eliminated as alleged in paragraph 26(d) of the indictment.

(e) The competitive manufacturers and sellers coerced into signing restrictive license agreements or excluded from the media industry by the means alleged in paragraph 32(b) of the indictment.

(f) Actual & potential competitive manufacturers and sellers excluded from the media industry by the means alleged in paragraph 32(c) of the indictment.

(g) Licensees under the Armour patents who were required to purchase iron oxide powder from Minnesota as alleged in paragraph 32(d) of the indictment.

15. As to Counts Seven, Eight and Nine of the indictment identify the following persons, firms or corporations by name and address of its principal place of business:

(a) The competitors coerced into accepting patent license agreements by the means alleged or as otherwise alleged in paragraph 44(a) of the indictment.

[fol. 31] (b) The competitors whom the defendant required or attempted to require to enter into license agreements as alleged in paragraph 44(b) of the indictment.

(c) Competitive manufacturers and sellers coerced into signing license agreements or excluded from the plate industry by the means alleged in paragraph 50(b) of the indictment.

(d) The actual or potential competitive manufacturers or sellers excluded from the plate industry by the means described in paragraph 50(c) of the indictment.

We are not at this time requesting any particulars except those which will aid us in determining whether to file a transfer or venue motion, and, these requests, of course, are made without prejudice to our rights for additional particulars by later motion.

Yours very truly,

/s/ John T. Chadwell
JOHN T. CHADWELL

JTC/t

cc: Honorable Casper Platt
United States District Judge
Post Office Building
Danville, Illinois

IN UNITED STATES DISTRICT COURT

United States Department of Justice
Room 404, United States Courthouse
Chicago 4, Illinois

January 31, 1962

60-358-89
John T. Chadwell, Esq.
Snyder, Chadwell, Keck, Kayser & Ruggles
135 South LaSalle Street
Chicago 3, Illinois

[fol. 32]

Re: United States v, Minnesota Mining and Manufacturing Company, Criminal Action No. 61-73-D

Dear Mr. Chadwell:

We have received your letter of December 28, 1961 requesting considerable detailed information for the purpose of aiding you in determining whether to file a motion to transfer on behalf of your client, defendant Minnesota Mining and Manufacturing Company ("Minnesota").

After examining your request, we find that it proceeds far beyond what may be needed to decide if a case could be transferred to another forum and descends into the minutia of the Government's evidence; consequently, we do not believe that we should supply, nor be required to supply, such information.

However, we stand willing to provide, by stipulation, the ultimate fact which you obviously seek in your letter. Namely, the Government is willing to stipulate that the evidence in this case would support the filing of a criminal case under each of the nine counts involved, not only in the Eastern District of Illinois, but also in the Northern District of Illinois, the District of Minnesota, and a number of other judicial districts in various States of the United States. In short, the Government is willing to state that the case now on file could have been filed in such other districts.

While the Government objects to revealing its evidence relating to the Eastern District of Illinois (and other districts), it is not averse to disclosing a portion of the details of its evidence, which is a matter of public record, namely, the filing and prosecution of a patent infringement suit on magnetic recording media against an inhabitant of the Eastern District of Illinois, C. K. Williams [fol. 33] & Co., Inc. ("Williams"). The evidence shows that Minnesota ordered its co-conspirator, Armour Research Foundation of Illinois Institute of Technology, to file said action in order to coerce Williams into accepting a patent license agreement from Minnesota—that Williams rejected the license as violative of the antitrust laws —that Minnesota joined in the patent suit with Armour and Minnesota's counsel participated in the prosecution thereof—that Minnesota brought a number of Minnesota employees and officials, including its president, Herbert Buetow, to testify in East St. Louis, Illinois on behalf of Minnesota and Armour—that, following the ruling of the District Court for the Eastern District of Illinois that the patent in question was invalid, Minnesota joined with Armour in an unsuccessful appeal therefrom.

This resume reflects but a portion of the evidence supporting venue in the Eastern District of Illinois.

I trust that the above will serve your purpose.

Sincerely yours,

LEE LOEVINGER
Assistant Attorney General

By /s/ Earl A. Jinkinson
EARL A. JINKINSON
Chief, Midwest Office
Antitrust Division

cc: Honorable Casper Platt
United States District Judge
Post Office Building
Danville, Illinois

[fol. 34]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

Criminal Action No. 61-73D

[Title Omitted]

DEFENDANT'S MOTION FOR EXAMINATION OF SUBPOENAE AND FOR PARTICULARS OF CERTAIN ALLEGATIONS IN THE INDICTMENT RELATING TO VENUE—February 6, 1962

Now comes the defendant, MINNESOTA MINING AND MANUFACTURING COMPANY, by its attorneys and moves the court, for the purposes of enabling the defendant to determine whether to file a motion for transfer of this cause under Rule 21(b) of the Federal Rules of Criminal Procedure and to assist the court in determining such motion should it be filed, for an order directing the plaintiff herein:

(1) To file with the Clerk of this court and make available for inspection by this defendant all subpoenae duces tecum and subpoenae ad testificandum which were issued by grand juries sitting at Danville, Illinois in connection with their investigation of the defendant from 1959 to the date of the indictment; and

(2) To serve on this defendant and to file with the court a bill of particulars of certain allegations in the indictment respecting matters relevant to Rule 18 and Rule 21 of the Federal Rules of Criminal Procedure (fully reserving the rights of the defendant hereafter to move for further particulars as to the indictment).

[fol. 35] Defendant requests particulars as to the following matters:

1. State what acts or actions of this defendant, in addition to the "resume" of the patent infringement suit involving C. K. Williams contained in the letter of Earl A. Jinkinson, attorney for plaintiff, to John T. Chadwell dated January 31, 1962, charged by the indictment to have been part of the alleged attempts or conspiracies to monop-

olize, or to restrain, interstate and foreign commerce in the products specified in the indictment, took place within the Eastern District of Illinois and on which the plaintiff intends to rely to support venue in the Eastern District of Illinois.

2. State the following information with respect to each of these judicial districts:

(1) Eastern District of Illinois
(2) Northern District of Illinois
(3) District of Minnesota

a. As to the alleged attempts to monopolize interstate and foreign trade and commerce in pressure sensitive tapes (paragraphs 8 and 9), in magnetic recording media (paragraphs 25 and 26), and in aluminum pre-sensitized lithographic plates (paragraphs 43 and 44) state with respect to each such product whether the alleged attempt was pursuant, in whole or in part, to a combination and conspiracy, if it was:

(1) State with respect to each such product whether the supposed combination and conspiracy or any part thereof was formed in any one of the foregoing districts, and if so, in which district or districts.

(2) As to each thing intended to be alleged as having been done as alleged in paragraphs 9, 26 and 44 of the indictment, state with respect to each such applicable paragraph the nature of such thing done in [fol. 36] each of the foregoing districts and the time and place in which done.

b. If any alleged attempt to monopolize interstate and foreign trade and commerce in one of the three products specified in subparagraph 2 a. above was not pursuant, in whole or in part, to a combination and conspiracy—

(1) State with respect to each such product whether or not the defendant attempted to monopolize in any one of the foregoing districts, and if so in which district or districts.

(2) As to each thing intended to be alleged as having been done as alleged in paragraphs 8 and 9, 25

and 26, and 43 and 44 of the indictment, state with respect to each such applicable paragraph the nature of each such thing done in each of the foregoing districts and the time and place in which done.

c. As to paragraphs 14 and 19 of the indictment state whether the supposed combination and conspiracy therein alleged, or any part thereof, was formed in any one of the foregoing districts, and if so in which district or districts.

d. As to paragraphs 15 and 16 of the indictment and as to said paragraphs as realleged in paragraph 20 of the indictment, as to each thing intended to be alleged as having been done as alleged in said paragraphs, state the nature of each such thing done in each of the foregoing districts and the time and place at which done.

e. As to paragraphs 31 and 36 of the indictment state whether the supposed combination and conspiracy therein alleged, or any part thereof, was formed in any one of the foregoing districts, and if so in which district or districts.

f. As to paragraphs 32 and 33 of the indictment, and as to said paragraphs as realleged in paragraph 37 of the indictment as to each thing intended to be alleged as hav-
[fol. 37] ing been done as alleged in said paragraphs, state the nature of each such thing done in each of the foregoing districts and the time and place at which done.

g. As to paragraphs 49 and 54 of the indictment state whether the supposed combination and conspiracy therein alleged, or any part thereof, was formed in any one of the foregoing districts, and if so in which district or districts.

h. As to paragraphs 50 and 51 of the indictment and as to said paragraphs as realleged in paragraph 55 of the indictment, as to each thing intended to be alleged as having been done as alleged in said paragraphs, state the nature of each such thing done in each of the foregoing districts and the time and place at which done.

3. As to Counts One, Two and Three of the indictment, identify the following persons, firms or corporations by name and state within which judicial district its principal place of business is located:

(a) Each competitor alleged to have been coerced to accept a patent license agreement as alleged in paragraph 9(a) of the indictment.

(b) Each competitor whom the defendant required or attempted to require to enter into the described patent license agreements with the defendant as alleged in paragraph 9(b) of the indictment.

(c) The actual or potential competitors of the defendant who were sued or threatened with suit as alleged in paragraph 9(c) of the indictment.

(d) The competitors who agreed with the defendant to do the things alleged in paragraph 9(e) of the indictment.

(e) The competitors, customers or suppliers of tape manufacturers, the ownership of whom or whose assets were acquired or attempted to be acquired by the defendant as alleged in paragraph 9(f) of the indictment.

[fol. 38] (f) The competitive manufacturers or sellers who were coerced into signing agreements or excluded from the tape industry as alleged in paragraph 15(b) of the indictment.

(g) The competitive manufacturers and sellers who were excluded from the pressure sensitive tape industry by the means alleged in paragraph 15(c) of the indictment.

4. As to Counts Four, Five and Six of the indictment identify the following persons, firms or corporations by name and state within which judicial district its principal place of business is located:

(a) Each competitor coerced into accepting patent license agreements by the means alleged or as otherwise alleged in paragraph 26(a) of the indictment.

(b) Each competitor of the defendant whom the defendant attempted to require to enter into patent license agreements as alleged in paragraph 26(b) of the indictment.

(c) The actual or potential competitors eliminated with respect to media as alleged in paragraph 26(c) of the indictment.

(d) Such persons, firms or corporations who had rights to operate under patents or patent applications of Armour licensed to defendant, whose rights under such patents or patent applications were eliminated as alleged in paragraph 26(d) of the indictment.

(e) The competitive manufacturers and sellers coerced into signing restrictive license agreements or excluded from the media industry by the means alleged in paragraph 32(b) of the indictment.

(f) Actual or potential competitive manufacturers and sellers excluded from the media industry by the means alleged in paragraph 32(c) of the indictment.

[fol. 39] (g) Licensees under the Armour patents who were required to purchase iron oxide powder from Minnesota as alleged in paragraph 32(d) of the indictment.

5. As to Counts Seven, Eight and Nine of the indictment identify the following persons, firms or corporations by name and address of its principal place of business:

(a) The competitors coerced into accepting patent license agreements by the means alleged or as otherwise alleged in paragraph 44(a) of the indictment.

(b) The competitors whom the defendant required or attempted to require to enter into license agreements as alleged in paragraph 44(b) of the indictment.

(c) Competitive manufacturers and sellers coerced into signing license agreements or excluded from the plate industry by the means alleged in paragraph 50(b) of the indictment.

(d) The actual or potential competitive manufacturers or sellers excluded from the plate industry by the means described in paragraph 50(c) of the indictment.

NOTE—For purposes of this bill of particulars only and without waiving the rights of the defendant to obtain the information requested in paragraphs 3, 4 and 5 above by a later bill of particulars, in lieu of the information requested by such paragraphs, the defendant requests in

the alternative a list of the prospective witnesses whom the government may call at the trial of this action identified by the city and state in which each resides.

[fol. 40] Minnesota Mining and Manufacturing Company

By .....
JOHN T. CHADWELL

Chadwell, Keck, Kayser,
Ruggles & McLaren
135 South LaSalle Street
Chicago 3, Illinois
RAndolph 6-2545

.....
VICTOR P. KAYSER

.....
GLENN W. McGEE

900 Bush Avenue
St. Paul, Minnesota
PRospect 6-811

.....
JOHN L. CONNOLLY

.....
ROBERT H. TUCKER

.....
RICHARD L. POST

.....
THOMAS J. LYONS

.....
ROBERT Z. HICKMAN

Gunn, Hickman and Kesler
1st National Bank Building
Danville, Illinois
HIckory 6-0880

[fol. 41]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

Criminal Action No. 61-73-D

[Title Omitted]

ORDER OF COURT—February 28, 1962

Be it remembered this 21st day of February 1962, the above entitled matter coming on for hearing before the undersigned, Chief Judge of the United States District Court for the Eastern District of Illinois, on the motion of defendant for examination of subpoenas and for a bill of particulars, and the Court having considered said motion, and having read the briefs filed by the respective parties, and having heard the arguments of counsel, and being otherwise fully advised in the premises, finds:

That the motion of the defendant Minnesota Mining and Manufacturing Company should be overruled,

IT IS THEREFORE ORDERED that the motion of the defendant Minnesota Mining and Manufacturing Company for examination of subpoenas heretofore issued by the United States of America in grand jury proceedings and for a bil of particulars be, and the same hereby is, denied.

ENTER:

/s/ Casper Platt
United States District Judge

Date: February 28, 1962

[fol. 42]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

Criminal Action No. 61-73-D

[Title Omitted]

DEFENDANT'S MOTION FOR TRANSFER OF THIS ACTION TO THE DISTRICT OF MINNESOTA—March 12, 1962

Pursuant to the provisions of Rule 21(b) of the Federal Rules of Criminal Procedure, defendant, MINNESOTA MINING AND MANUFACTURING COMPANY, by its attorneys, hereby moves the court for the entry of an order transferring this action to the United States District Court for the District of Minnesota and directing the Clerk of this court to transmit the files and records of the proceedings herein to the Clerk of the United States District Court for the District of Minnesota.

[fol. 43] As grounds for said motion, defendant states:

1. The offenses charged are alleged to have been committed within the District of Minnesota as well as in the Eastern District of Illinois.

2. Transfer of this action to the United States District Court for the District of Minnesota would be in the interest of justice, all as appears from the affidavits of John L. Connolly, William L. McKnight, Bert S. Cross, Clarence B. Sampair, Robert L. Westbee, William H. Abbott, William C. Hunt, Robert Z. Hickman and Glenn W.

McGee, and the Memorandum filed in support of this motion.

MINNESOTA MINING AND MANUFACTURING COMPANY

By JOHN T. CHADWELL

Of Counsel:

Chadwell, Keck, Kayser, Ruggles & McLaren
135 South LaSalle Streeet
Chicago 3, Illinois
RAndolph 6-2545

VICTOR P. KAYSER

GLENN W. McGEE

900 Bush Avenue
St. Paul, Minnesota
PRospect 6-8511

JOHN L. CONNOLLY

ROBERT H. TUCKER

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Gunn, Hickman and Kesler
1st National Bank Bldg.
Danville, Illinois
HIckory 6-0880

THOMAS J. LYONS

ROBERT Z. HICKMAN

Attorneys for defendant

[fol. 44]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

[Title Omitted]

AFFIDAVIT OF JOHN L. CONNOLLY IN SUPPORT OF MOTION TO TRANSFER THIS ACTION TO THE DISTRICT COURT OF MINNESOTA.

STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

JOHN L. CONNOLLY, being duly sworn, on oath deposes and says:

1. I am general counsel and a director of Minnesota Mining and Manufacturing Company ("3 M"), defendant in the above-entitled criminal action. I was first employed by 3M on July 1, 1937 and since that time have served as its general counsel. I have read the indictment returned against 3M by the Federal Grand Jury sitting in Danville, Illinois, on December 13, 1961 ("the indictment") and am familiar with its contents.

2. The indictment alleges that 3 M, largely through patents, patent licenses, or patent infringement suits or threats thereof, has attemped to and conspired to monopolize and has conspired to restrain interstate and foreign trade and commerce in (1) pressure sensitive tapes, (2) magnetic recording media, and (3) aluminum presensitized lithographic plates. It is also alleged that by certain competitive practices outside of patents, trade and commerce in these three product classification has been restrained.

[fol. 45] 3. 3 M presently has eleven directors, twenty-nine corporate officers (some of whom are also directors) and twelve division and domestic subsidiary officers. None of these officers or directors resides within the Eastern

District of Illinois. All but two of them reside in or near St. Paul, Minnesota.

4. 3 M is a Delaware corporation whose general and administrative offices are presently located at 900 Bush Avenue, St. Paul, Minnesota; most of the 3 M research laboratories and several principal manufacturing plants producing pressure sensitive tapes and aluminum presensitized lithographic plates are located in the St. Paul area; a plant manufacturing magnetic recording tape is located at Hutchinson, Minnesota, within 100 miles of St. Paul; 3 M has seven domestic subsidiaries outside St. Paul; thirty-three plant locations outside St. Paul; and twenty branch sales offices outside St. Paul, not one of which is located in the Eastern District of Illinois.

5. To the best of my information and belief the indictment arose out of an investigation of 3 M first initiated by the antitrust division of the Department of Justice in 1945. In March or April of that year, Mr. Melville Williams, an attorney from the Midwest Office, Antitrust Division, Chicago, Illinois, visited the 3 M offices at St. Paul, Minnesota and requested that he be allowed to examine certain documents dating back as far as 1931 in the possession of the company concerning patents and patent licenses on pressure sensitive tapes, one of the three products, interstate and foreign commerce in which, the indictment alleges 3 M has attempted to or conspired to monopolize. Pursuant to said request, 3 M furnished Mr. Williams hundreds of documents from which he selected approximately 340 of which he was given copies. In 1948, 1953, 1955 and 1956-1957 agents of the Federal Bureau of Investigation acting in behalf of the Antitrust Division [fol. 46] made further examinations of 3 M files, hundreds of documents were submitted and again copies were furnished to the Division either in Chicago, Illinois, or Washington, D. C. I believe that all such documents were eventually given to the Midwest Office of the Division for its use in connection with the grand jury investigation which culminated in the indictment.

6. In April, 1959, 3 M was served with a subpoena *duces tecum* issued by the grand jury commanding it to produce for examination documents relating to the com-

pany's operations in the three products mentioned in the indictment, literal compliance with which would have been impossible without complete disruption of 3 M's business. Pursuant to agreement with Mr. Earl Jinkinson, Chief of the Midwest Office, Messrs. Hernacki and Peck of that office visited St. Paul and thousands of documents were made available for their examination. Pursuant to their request the originals of certain of these documents were delivered to the Midwest Office of the Division in Chicago, Illinois. Documents in response to additional subpoena issued by the grand jury and to additional requests by the attorneys were likewise delivered to the Midwest Office at Chicago. Based on information furnished me by counsel for other persons, firms and corporations whose records were also subpoenaed by the Danville grand jury, I believe all documents furnished by such persons, firms or corporations were delivered to the Midwest Office of the Antitrust Division in Chicago.

7. In the course of the aforesaid investigations, the Midwest Office has taken from 3 M files and retained over fifteen thousand documents. I am informed and believe that several thousand documents from other grand jury witnesses have been retained by the Midwest Office and to the best of my knowledge and belief all such documents are now located in Chicago.

[fol. 47] 8. It is essential to the defense of this case that copies of all documents now in the possession of the government, as well as many other documents examined by the government but not taken, be available to defense counsel. For example, the indictment alleges that by the prosecution of patent infringement suits or threats thereof, 3 M has allegedly attempted to and conspired to monopolize interstate and foreign commerce in the products specified. In the period covered by the indictment from 1931 to date 3 M has been both plaintiff and defendant in thirty-eight patent cases involving pressure sensitive tape, magnetic recording media, and lithographic plates, each of which will be of considerable importance in this action. The files and records for such cases are all located in the offices of patent counsel in St. Paul and are stored in more than 15 file cabinets, all of which must be availa-

ble for trial. Copies of 3 M documents taken by the government are presently located either in my office in St. Paul or at the offices of Chadwell, Keck, Kayser, Ruggles & McLaren, 135 South LaSalle Street, Chicago 3, Illinois, trial counsel. Documents not taken by the government are presently located in either my offices or the offices of the divisions concerned in St. Paul. Eventually all such documents will have to be located at the place of trial; to require 3 M to prepare and transport them to the Eastern District of Illinois would be burdensome and unfair, not only from the standpoint of the expense involved in the preparation and transportation, but the additional expense which will be required in the way of file cabinets and office space to house them.

9. As noted above, the indictment involves three general product classifications, (1) pressure sensitive tapes, (2) magnetic recording media, and (3) aluminum presensitized lithographic plates. Since at least 1949 3 M has operated on a decentralized basis, whereby the responsi- [fol. 48] bility for the manufacture and sale of various products is lodged with various executives. In the case of pressure sensitive tapes (other than electrical), Mr. C. B. Sampair, executive vice president of 3 M is and has been since 1956 responsible for these products; Mr. B. S. Cross, executive vice president of 3 M is and has been since February, 1951 in charge of lithographic plates; Mr. R. L. Westbee, group vice president of 3 M, is and has been since 1948 responsible for electrical pressure sensitive tape and magnetic products. Each of these executives has responsibilities for other 3 M products as well as those stated. Until his semi-retirement in 1956, Mr. William L. McKnight, chairman of the board of 3 M was very active in all patent matters involving 3 M products and since as early as 1929 has relied upon the services of the members of what is now the law firm of Carpenter Abbott Coulter & Kinney, for their advice and counsel in patent matters. One or more of the members of that firm is familiar with each of the products covered by the indictment and the patents, licenses or infringement suits which have been connected with the product. In my opinion, adequate defense of this action will require the presence at

the trial of operating personnel who are thoroughly familiar with the industries in which these products are sold. Knowledge of competitors, competitive conditions and industry activities which these men have must be available to immediately counteract evidence presented by the plaintiff with respect to each of the products involved. In addition, the allegations of the complaint concerning patents and patent licensees necessitate that patent counsel be present when evidence as to such matters is presented. As a result I believe the following persons for each of the indicated products plus such subordinates as the executive now in charge may deem necessary should be [fol. 49] present when evidence is presented as to the product:

Pressure Sensitive Tape (Other than Electrical)	—	Mr. McKnight Mr. Sampair Mr. Carpenter Mr. Kinney Mr. Coulter
Electrical Tape	—	Mr. McKnight Mr. Westbee Mr. Carpenter Mr. Kinney Mr. Coulter
Magnetic Recording Media	—	Mr. McKnight Mr. Westbee Mr. Abbott
Presensitized Lithographic Plates	—	Mr. Cross Mr. Kinney Mr. Carpenter

All of these gentlemen reside in or near St. Paul, Minnesota, and also have their offices in St. Paul.

In addition to the operation personnel and patent counsel, at least two or three lawyers from my office whose residences and offices are in St. Paul plus trial counsel's staff will be required to handle the immense detail of the trial.

10. As noted above the indictment charges 3 M with attempts or conspiracies to monopolize interstate and foreign commerce in the three product classifications mainly by alleged activities concerning patents. The importance of patents to 3 M cannot be overestimated and the attack on them by the plaintiff acting under the antitrust laws constitutes a serious threat to 3 M's entire operations. [fol. 50] Accordingly, it is necessary that 3 M be defended in this action by trial counsel thorougly experienced in the antitrust laws and antitrust litigation. After considerable investigation of firms experienced in this field I recommended that 3 M obtain the services of John T. Chadwell and his firm to defend 3 M in this litigation and he will be in charge of the preparation and trial of this case whenever it is tried.

While I have the greatest respect for Mr. Robert Z. Hickman, 3 M's Danville counsel, and other members of the Danville Bar, in my judgment 3 M's defense of the charges in the indictment would be seriously jeopardized if 3 M did not retain Mr. Chadwell as its trial counsel. Mr. Chadwell has informed me, and I have agreed, that if trial of this cause is to take place in the Eastern District of Illinois it would be very necessary for Mr. Hickman to actively participate in the preparation and trial of the case. On the other hand, if trial were held in the District of Minnesota where I and my associates are admitted to practice, it would not be necessary for 3 M to retain the services of additional Minnesota counsel or Mr. Hickman and the expense of defending this litigation to 3 M would accordingly be reduced by the amount which will have to be paid for Mr. Hickman's services if trial were held in this district.

11. 3 M has no offices or other facilities in Danville as shown by the foregoing paragraphs of this affidavit. Adequate defense of the charges in the indictment will necessitate that quarters be obtained in Danville for trial counsel and members of his staff and the persons specified in paragraph 9 hereof for the period of time required by the trial. Mr. Chadwell and I estimate that not less than six months would be required for the on-the-scene preparation and trial of this case. In addition to living quarters

3 M would have to obtain office space sufficient to provide [fol. 51] offices for all counsel, and would have to acquire clerical help, typewriters, file cabinets, photocopying machines and the other usual office accouterments. At my request Mr. Hickman has investigated the costs of obtaining such facilities and as set forth in his affidavit it appears that such costs would amount to approximately $17,500 per month which multiplied by six equals an added expense to 3 M of $105,000 not including the expense of office or other facilities for the use of 3 M executives in carrying on their business duties.

12. If trial were held in the District of Minnesota none of my staff nor any of the persons specified in paragraph 9 hereof would have to be furnished living quarters, nor would additional office facilities be necessary for such persons. Trial counsel's staff would be adequately served from 3 M home office facilities in St. Paul, Minnesota. It is obvious from the foregoing that it will be far less expensive for 3 M were trial to be held in the District of Minnesota rather than in the Eastern District of Illinois, and that likewise the business of 3 M would be less disrupted by having trial in the districts where 3 M office facilities are available to the 3 M executives.

13. I know of no justification for the institution of this action in the Eastern District of Illinois. In defense of the charges contained in the indictment 3 M will rely on the documents specified above, all of which are located in Chicago or St. Paul, and the testimony of witnesses who, according to our present information, for the most part will be executive officers of 3 M, almost all of whom reside in St. Paul and none of whom to my knowledge resides in the Eastern District of Illinois. From the investigation we have been able to make to date of persons who testified before the Grand Jury at Danville, Illinois, concerning the subject matter of the indictment, no witness who appeared before the Grand Jury resided in the [fol. 52] Eastern District of Illinois. It thus appears that it would not be inconvenient for the government witnesses if this case were transfered from said district to the District of Minnesota and it would be very inconvenient for

the defense witnesses if the case is not transfered from the Eastern District of Illinois.

14. From my examination of the 3 M documents submitted to the Grand Jury and from interviews which I have had with 3 M executives, I know of no licensee of 3 M patents nor any competitor of 3 M whose principal place of business is located in the Eastern District of Illinois who would be considered a licensee or competitor of 3 M as those terms are used in Count One, Three, Four, Six, Seven and Nine of the indictment with the possible exception of C. K. Williams Co. of East St. Louis, Illinois, which might be considered a "competitor" under Counts Four and Six. I further know of no meetings or negotiations with respect to patent licenses which would be involved in such Counts which took place within the Eastern District of Illinois; however, I know that many meetings concerning patent licenses took place in St. Paul, Minnesota.

15. The indictment reveals that none of the principal places of business of the alleged co-conspirators of 3 M named in Counts Two, Five and Eight is located within the Eastern District of Illinois. I assume that with respect to such counts, the plaintiff would be prepared to present evidence of meetings between 3 M and its alleged co-conspirators at which the alleged illegal combination and conspiracy was formed and/or continued. From my examination of the documents submitted to the Grand Jury and from interviews which I have had with 3 M executives, I know of no meeting attended by 3 M personnel with any of the alleged co-conspirators which took place in the Eastern District of Illinois. However, as noted [fol. 53] above, these documents reveal that there have been meetings between 3 M and the alleged co-conspirators concerning patent licenses in the District of Minnesota.

16. I have caused an investigation to be made of the status of the Criminal Docket of the Third and Fourth Divisions of the District of Minnesota located in Minneapolis and St. Paul, respectively, and have been informed and believe that said dockets are current, and

that no delay would be had in the trial of this cause by reason of congestion of such dockets.

/s/ John L. Connolly
JOHN L. CONNOLLY

Subscribed and Sworn to
before me this 7th day
of March, 1962.

/s/ Frances H. Faris
Notary Public

My Commission Expires March 1, 1965

[SEAL]

[fol. 54]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

[Title Omitted]

AFFIDAVIT OF WILLIAM L. MCKNIGHT IN SUPPORT OF MOTION TO TRANSFER THIS ACTION TO DISTRICT OF MINNESOTA

STATE OF FLORIDA)
) ss
COUNTY OF DADE)

WILLIAM L. MCKNIGHT, being first duly sworn, on oath deposes and says:

1. I am Chairman of the Board of Minnesota Mining and Manufacturing Company ("3M"), defendant in the above entitled criminal action. I was first employed by 3M as a bookkeeper on May 13, 1907, served as vice president, general manager and a director from 1915 to 1929, and from 1929 to 1949 served as president and chief executive officer of the company. During this period I was generally familiar with all phases of 3M operations, and particularly with all matters concerning patents and patent policies. Since my retirement as chief executive officer in 1949, I have not continued actively in the day to day operations of the company but am still a large stockholder as well as an officer and director of 3M.

2. I have read the indictment returned by the grand jury at Danville, Illinois on December 13, 1961 against 3M, am familiar with its contents and understand that among other things the indictment charges that 3M attempted to monopolize, and conspired to monopolize interstate and foreign trade and commerce in the manu-
[fol. 55] facture and sale of (1) pressure sensitive tapes, (2) magnetic recording media and (3) aluminum presensitized lithographic plates. I further understand that the indictment alleges that in furtherance of the alleged

attempts and conspiracies to monopolize, 3M engaged in certain actions involving its patents and patent-licenses which actions are set forth in the indictment. While I was not involved in the negotiations for the patent license issued by 3M for the manufacture and sale of aluminum pre-sensitized plates, I am more familiar than any other 3M executive with the facts and circumstances surrounding the patents and for many years took the leading part in patent license negotiations involving pressure sensitive tapes and to a lesser but substantial extent I had a similar role in connection with magnetic recording media.

3. To the best of my knowledge, no transactions involving patents owned or licensed by 3M on pressure sensitive tapes, nor any negotiations for patent licenses on any 3M products occurred in the Eastern District of Illinois. On the contrary, there were negotiations for pressure sensitive tape and magnetic recording media licenses with which I am familiar in meetings held in Chicago, Illinois, St. Paul, Minnesota or New York City.

4. No suit involving patent infringement has been brought by 3M in the Eastern District of Illinois. By the action of the defendant C. K. Williams Co., 3M was made a party plaintiff to litigation involving magnetic recording media in the Eastern District of Illinois, but the suit had been brought by Armour Research Institute, 3M's licensor of the patent in question. It was necessary in this case for 3M to defend itself against charges of misuse of patents and anti-trust violations made in a counterclaim of C. K. Williams against 3M. These charges were dismissed. Apart from this litigation there have been no suits involving patent infringements or threats thereof in- [fol. 56] stituted or defended by 3M on any of its products in the Eastern District of Illinois, but there have been many such suits in which 3M was plaintiff or defendant outside the Eastern District of Illinois.

5. Because of my familiarity with the matters involving patents and my active participation in the negotiations for patent licenses on pressure sensitive tapes and magnetic recording media counsel has informed me that my presence at the trial during the time that evidence as to these products is being offered by the plaintiff would be

necessary to enable 3M to adequately defend itself and that I shall in all probability be called as a witness for the defense with respect to these matters. I have also been informed by counsel for 3M and believe that a substantial amount of time will be required for the trial of the allegations of the indictment concerning these two products which as nearly as can be estimated will be not less than two months and perhaps a much longer period; and, in addition, that I shall be expected to spend substantial amounts of time at the situs of the trial to assist in preparation of the defense.

6. My home is located at 1885 Summit Avenue, St. Paul 5, Minnesota; my office is located in the 3 M Building at 900 Bush Avenue, St. Paul, Minnesota. I shall be 75 years of age on November 11, 1962 and have had difficulty in recovering from an operation which was performed in March, 1961. My personal physician is Dr. Joseph Borg whose offices are located in St. Paul. My presence at the trial situs for the extended periods of time required in this case will necessarily work a severe hardship on me in view of my age and physical condition, but this hardship will be greatly minimized if the trial is held at St. Paul, Minnesota, rather than Danville, Illinois. Living at home in surroundings with which I am familiar and where I have ready access to my physician in whom I [fol. 57] have great confidence, would enable me to rest much better and to work much more efficiently and with less physical strain than would be possible living in a hotel at Danville and working under less convenient conditions. In St. Paul, my files to which reference may have to be made will be readily available at my office, my secretary who is familiar with them lives in St. Paul and will also be available which would greatly relieve the mental and physical strain on me in assisting in the defense of this case. Furthermore, there would be much heavier expense both to me and to the company if I were forced to be present at a trial in Danville, and I believe the defense of 3 M will be seriously jeopardized and I shall be personally greatly handicapped in assisting in the presentation of the defense if the trial is conducted in that juris-

diction where I shall be able to work only under serious strain and handicaps.

/s/ William L. McKnight
WILLIAM S. MCKNIGHT

Subscribed and Sworn to
before me this 21 day
of February, A.D. 1962.

/s/ Ann M. Griffith
Notary Public

Notary Public, State of Florida at Large
My Commission Expires June 8, 1965.

[SEAL]

[fol. 58]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

[Title Omitted]

AFFIDAVIT OF BERT S. CROSS IN SUPPORT OF MOTION TO TRANSFER THIS ACTION TO THE DISTRICT OF MINNESOTA

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BERT S. CROSS, being first duly sworn, on oath deposes and says:

1. I am presently an executive vice president and director of Minnesota Mining and Manufacturing Company ("3M"), defendant in the above entitled criminal action. My home address is Pine Tree Hills, Route 9, Mahtomedi 15, Minnesota, and my office is located in the 3M Building, 900 Bush Avenue, St. Paul, Minnesota. I was first employed by 3M in 1926 as a laboratory technician. From 1930 to 1942 I was factory manager of the Glue Bond Sandpaper Division and in 1942 was put in charge of the New Products Division. In 1945 the Reflective Products Division was added to my jurisdiction, I was made a vice president in 1948 and in 1952 I became the first head of the Graphic Products Group. Included in the Graphic Products Group are the Reflective Products Division, the Printing Products Division, the Duplicating Products Division, and the National Advertising Company. At present I am also responsible to the president and board of directors for operations of Revere Camera Company, a [fol. 59] wholly owned subsidiary. Since 1951, I have been active in all phases of the company's operations concerning aluminum presensitized lithographic plates ("plates") and have been generally in charge of all patent and patent license matters concerning plates.

2. I have read the indictment returned by the grand jury at Danville, Illinois on December 13, 1961 against

3M, am familiar with its contents and understand that among other things the indictment charges that 3M attempted to monopolize, conspired to restrain, and conspired to monopolize interstate and foreign trade and commerce in the manufacture and sale of (1) pressure sensitive tapes, (2) magnetic recording media and (3) aluminum presensitized lithographic plates. I further understand that the indictment alleges that in furtherance of the alleged attempts and conspiracies to monopolize, 3M engaged in certain actions involving its patents and patent licenses which actions are set forth in the indictment. Since 1951 I have had the responsibility for and have been engaged in many activities and negotiations concerning patents and patent licenses on plates. I am thoroughly familiar with all patents and patent license negotiations, and the agreements involving patents and patent licenses on plates.

3. I know of no transactions involving patents owned or licensed by 3M on plates, no negotiations for patent licenses or suits involving patent infringement which have occurred in the Eastern District of Illinois, nor do I know of any notice of patent infringement having been sent to such district. On the contrary, all negotiations for the license issued by 3M to A. B. Dick Company, its only licensee under patents involving plates, took place in St. Paul, Minnesota or Chicago, Illinois.

4. Because of my close connection with all matters involving plates, counsel for 3M has informed me that my presence at the trial during the time that evidence as to [fol. 60] plates is being offered by the plaintiff will be necessary to enable 3M to adequately defend itself and that I shall in all probability be called as a witness for the defense with respect to these matters. I have also been informed by counsel and believe that the time required for the trial of the allegations concerning plates will in all probability be not less than two weeks and that my presence at the trial situs will also be required for substantial periods of time to assist in the preparation of the defense.

5. As noted above, in the course of my duties as executive vice president of 3M, I have primary responsibility to the president and the board of directors not only for

plates, but also for operations in reflective products and duplicating products as well as for the operations of the National Advertising Company and the Revere Camera Company, which are wholly owned subsidiaries of 3M. In connection with the operations of these other divisions, I must make decisions from day to day concerning problems in the production, distribution and sales of all of these products. I, of course, have voluminous files respecting these divisions and their products at my office in St. Paul, Minnesota. It would be extremely burdensome for me and for 3M operations involving these products if a trial of this cause were held in the Eastern District of Illinois, rather than in the District of Minnesota. If trial were held in the District of Minnesota, my files will be readily available for my use, I shall be more easily reached by my subordinates, and I could spend substantial amounts of time at my office during recesses or other breaks in the trial. In addition if the course of the trial indicated that my presence would not be required for as much as a day or a half day, I could carry on my duties at my office during such time.

6. The plate business of 3M is the responsibility of the Printing Products Division which is headed by Mr. E. J. Kane. Mr. Kane is more closely related to the day to day [fol. 61] operations of the company in plates and has more detailed knowledge as to many competitive activities and industry conditions in that field than I. Prior to the time that plates came under my jurisdiction, Mr. Lloyd A. Hatch had been in charge of the development of the product which ultimately resulted in the patent. Mr. Clifford Jewett, who was and is employed by 3M, was one of the inventors of the plate which is the subject matter of this litigation. In my judgment it will be necessary for all three of these gentlemen to be present throughout the presentation of evidence by the plaintiff concerning plates in order that 3M may adequately defend itself against the charges in the indictment concerning plates. All of these men reside in or near St. Paul, Minnesota, and their offices are also in St. Paul, Minnesota. The demands of the trial on their time and the resulting disruption of 3M business will be much less if trial were held in the

District of Minnesota, rather than in the Eastern District of Illinois, for the same reasons as those set forth above as to my own operations.

7. To the best of my knowledge all transactions involving plates with which I am familiar and which may be challenged by the indictment have taken place outside the Eastern District of Illinois and I believe 3M's defense will be jeopardized and its business unduly disrupted if trial must be held in this jurisdiction which had little if anything to do with the transactions alleged in the indictment.

/s/ Bert S. Cross
BERT S. CROSS

Subscribed and Sworn to
before me this 16th day
of February, 1962.

/s/ Dorothy Taus
Notary Public

[SEAL]

[fol. 62]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

[Title Omitted]

AFFIDAVIT OF CLARENCE B. SAMPAIR IN SUPPORT OF MOTION TO TRANSFER THIS ACTION TO THE DISTRICT OF MINNESOTA.

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

CLARENCE B. SAMPAIR, being first duly sworn, on oath deposes and says:

1. I am presently an executive vice president of Minnesota Mining and Manufacturing Company ("3M"), defendant in the above entitled criminal action. My home address is 1465 Summit Avenue, St. Paul 5, Minnesota, and my office is located in the 3M Building at 900 Bush Avenue, St. Paul, Minnesota. I was first employed by 3M on September 13, 1927 and worked as production manager for various divisions and eventually for the entire company until 1947, when I was elected vice president in charge of all production. I continued in this position until 1951. From 1951 until 1955 I was president of 3M's International Division, and in 1955 was elected a director of 3M and given the additional responsibility for all domestic operations involving pressure sensitive tapes. In 1956 I was elected executive vice president and since that time [fol. 63] have continued as president of the International Division and have also been in charge of the production, distribution and sales in the United States of all pressure sensitive tapes except electrical tape. Since 1955 I have been active in all phases of the company's operations concerning tapes and have been generally in charge of negotiations for patent licenses concerning tape.

2. I have read the indictment returned by the Grand Jury at Danville, Illinois, on December 13, 1961 against

3M, am familiar with its contents and understand that, among other things, the indictment charges that 3M attempted to monopolize, conspired to restrain, and conspired to monopolize interstate and foreign trade and commerce in the manufacture and sale of (1) pressure sensitive tapes, (2) magnetic recording media, and (3) aluminum pre-sensitized lithographic plates. I further understand that the indictment alleged that in furtherance of the alleged attempts and conspiracies, 3M engaged in certain actions involving its patents and patent licenses which are set forth in the indictment. Since 1956 I have had the responsibility for and have been engaged in activities and negotiations concerning patents and patent licenses on all varieties of pressure sensitive tapes other than electrical tapes. I am thoroughly familiar with all patent license negotiations and agreements involving patents and patent licenses on such pressure sensitive tape.

3. To the best of my knowledge no transactions involving any of the patents owned or licensed by 3M with which I have been connected, no negotiations for such patent licenses and no suits involving patent infringements or notices of patent infringement have been carried out in the Eastern District of Illinois. On the contrary, all negotiations for licenses with which I am familiar took place at meetings held in Chicago, Illinois; St. [fol. 64] Paul, Minnesota or New York City; and, all patent infringement suits involving tape in which 3M was plaintiff or defendant were brought outside the Eastern District of Illinois.

4. Because of my close connection with all matters involving pressure sensitive tapes other than electrical tapes, counsel for 3M has informed me that my presence at the trial during the time that evidence as to these tapes is being offered by the plaintiff would be necessary to enable 3M to adequately defend itself and that I shall in all probability be called as a witness for the defense with respect to these matters. I have also been informed by 3M's counsel and believe that the time required for the trial of the allegations concerning these tapes will in all probability be a minimum of two months; and, in addition, that I shall be expected to spend substantial amounts

of time at the scene of the trial to assist in preparation of the defense.

5. In the course of my duties as executive vice president of 3M I have primary responsibility to the president and the board of directors, not only for tapes, but also as noted above, I am also president of the International Division and have primary responsibility for the operations of such division. In this division, decisions must be made from day to day concerning 3M operations in countries located throughout the world, and I, of course, have voluminous files respecting such operations located in my office in St. Paul, Minnesota. It would be extremely burdensome for me and for 3M operations if trial of this cause were held in the Eastern District of Illinois rather than the District of Minnesota. If trial were held in the District of Minnesota my international files will be readily available for my use, I shall be more easily reached by my subordinates, and I could spend substantial amounts of time at my office during recesses or other breaks in the [fol. 65] trial. Likewise, depending on the course of the trial, I might even be ale to spend entire days or half days at my office when my presence was not required. This, of course, would not be possible if trial were held in the Eastern District of Illinois where 3M has no offices or other facilities, and would result in serious disruption of 3M's business, particularly in the international field.

6. The pressure sensitive tape business of 3M is divided among several divisions. Vinyl or electrical tape is assigned to the Electrical Products Group which is not my direct responsibility. As to the other pressure sensitive tapes described in the indictment as "cellophane," "paper masking," "filament or strand laminated," and "acetate fiber" tapes, responsibilities for these products is divided between the Industrial Trades Tape Division and the Retail Tape and Gift Wrap Division which are headed by Mr. R. W. Adam and Mr. A. K. Redpath, respectively, These two gentlemen report directly to Mr. R. W. Mueller who is in charge of both these divisions and another tape division. Because these gentlemen are more closely related to the day to day operation of the company with respect to tapes and have more detailed knowledge as to

competition, competitive activity and industry conditions than I do, in my judgment it will be necessary for all three of them to be present during the presentation of evidence concerning these products at the trial. The demands of the trial on their time and the resulting disruption of 3M business would be much less if trial were held in the District of Minnesota rather than the Eastern District of Illinois for the same reasons as those set forth above as to my own operations.

7. To the best of my knowledge all transactions in the field of tapes with which I am familiar and which may be [fol. 66] challenged by the indictment have taken place outside the Eastern District of Illinois, and I believe 3M's defense will be jeopardized and its business unduly disrupted if trial must be held in a jurisdiction which had little, if anything to do with the transactions alleged in the indictment.

/s/ Clarence B. Sampair

Subscribed and Sworn to
before me this 21st day
of February, 1962.

/s/ Frances Edel
Notary Public

Frances Edel
Notary Public, Ramsey County, Minn.
My Commission Expires April 30, 1967

[SEAL]

[fol. 67]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

[Title Omitted]

AFFIDAVIT OF ROBERT L. WESTBEE IN SUPPORT OF MOTION TO TRANSFER THIS ACTION TO THE DISTRICT COURT OF MINNESOTA.

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

ROBERT L. WESTBEE, being first duly sworn, on oath deposes and says:

1. I am presently a group vice president of Minnesota Mining and Manufacturing Company ("3M"), defendant in the above entitled criminal action. My home address is 12 Eagle Ridge Road, North Oaks, St. Paul 10, Minnesota, and my office is located in the 3M Building at 900 Bush Avenue, St. Paul, Minnesota. My employment by 3M began in 1933 as a laboratory assistant. In 1938 I transferred into sales and was made sales manager for electrical tapes in 1941. I became general manager of all electrical products in 1948 and was elected vice president in charge of the Electrical Products Group in 1954. Included within the Electrical Products Group are the Electrical Products Division, the Magnetic Products Division, the Irvington Varnish and Insulator Division, the Mincom Division, the Mica Insulator Division and American Lava Corporation, a wholly owned subsidiary of 3M. I am responsible to the president and the board of directors for all operations of each of these divisions. Pressure sensitive tapes for holding, insulating and protecting ("electrical tapes") are produced and sold by the Electrical [fol. 68] Products Division; magnetic recording media are produced and sold by the Magnetic Products Division. I have been actively in charge of all phases of 3M operations concerning these products since 1954 and am familiar with the growth and development of both of them.

2. I have read the indictment returned by the Grand Jury at Danville, Illinois, on December 13, 1961 against 3M, am familiar with its contents and understand that, among other things, the indictment charges that 3M attempted to monopolize, conspired to restrain, and conspired to monopolize interstate and foreign trade and commerce in the manufacture and sale of (1) pressure sensitive tapes, (2) magentic recording media, and (3) aluminum presensitized lithographic plates. I further understand that the indictment alleges that in furtherance of the alleged attempts and conspiracies, 3M engaged in certain actions involving its patents and patent licenses which are set forth in the indictment. Since 1954, subject to the supervision of Mr. McKnight from time to time, I have had the responsibility for and have been engaged in many activities and negotiations concerning patents and patent licenses on all varieties of electrical tape and magnetic recording media. I am familiar with all such patents and patent license negotiations and agreements involving patents and patent licenses on such products.

3. I know of no manufacturer of electrical pressure sensitive tape or of magnetic recording media as those terms are used in the indictment whose principal place of business is located in the Eastern District of Illinois other than C. K. Williams & Co. of East St. Louis, Illinois, which does manufacture iron oxide powder for use in magnetic recording media. To the best of my knowledge no negotiations for patent licenses of the patents owned or licensed by 3M on electrical tape or magnetic recording media have occurred in the Eastern District of Illinois. On the contrary, there were negotiations for licenses with [fol. 69] which I am familiar at meeting held in Chicago, Illinois, St. Paul, Minnesota, or New York City.

4. Because of my close connection with all matters involving electrical tapes and magnetic recording media, counsel for 3M has informed me that my presence at the trial during the time that evidence as to these products is being offered by the plaintiff would be necessary to enable 3M to adequately defend itself and that I shall in all probability be called as a witness for the defense with

respect to these matters. I have also been informed by 3M's counsel and believe that the time required for the trial of the allegations concerning these products will in all probability be not less than six weeks and that my presence at the trial situs will also be necessary for a substantial additional period of time to assist in the preparation of the defense.

5. In the course of my duties as group vice president of 3M I have primary responsibility to the president and the board of directors, not only for electrical tapes and magnetic recording media, but also as noted above, I also have primary responsibility for the operations of three other divisions and a wholly owned subsidiary. In connection with the operation of these other divisions and the subsidiary, I must make decisions from day to day concerning problems in the production, distribution and sale of all the products produced and sold by them. I, of course, have voluminous files concerning these divisions. It would be extremely burdensome for me and for the 3M operations involving the products of the other divisions if a trial were held in the Eastern District of Illinois rather than in the District of Minnesota. If trial were held in the District of Minnesota, my files will be readily available for my use, I shall be more easily reached by my subordinates and I could spend substantial amounts of time at my office during recesses or other breaks in the trial. In addition, if the course of the trial indicated that my presence would not be required for as much as a day [fol. 70] or a half day, I could carry on my duties at my office during such time.

6. As noted above, electrical tapes are products of the 3M electrical products division and magnetic recording media are products of the magnetic products division. These divisions are headed, respectively, by Mr. R. V. Holton and Mr. W. W. Wetzel. They are more closely related to day to day operations of the company and have more detailed knowledge as to many competitive activities and industry conditions than I. In order to be prepared to defend this case and to assist counsel in evaluating the evidence which way be presented concerning these products, in my judgment it will be necessary for both of

these gentlemen to be present throughout the time at trial when evidence is being offered as to these products. The demands of the trial on their time and the resulting disruption of 3M business would be much less if trial were held in the District of Minnesota rather than the Eastern District of Illinois for the same reasons as those set forth above as to my own operations.

7. To the best of my knowledge all transactions in the field of electrical tapes with which I am familiar and which may be challenged by the indictment have taken place outside the Eastern District of Illinois, and I believe 3M's defense will be jeopardized and its business unduly disrupted if trial must be held in a jurisdiction which had little, if anything, to do with the transactions alleged in the indictment.

/s/ Robert L. Westbee
ROBERT L. WESTBEE

/s/ Frances Edel
Notary Public

Subscribed and Sworn to
before me this 6th day
of March 1962.

Frances Edel
Notary public Ramsey County, Minn.
My Commission Expires April 30, 1967

[SEAL]

[fol. 71]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

[Title Omitted]

AFFIDAVIT OF WILLIAM H. ABBOTT IN SUPPORT OF MOTION TO TRANSFER THIS ACTION TO THE DISTRICT OF MINNESOTA.

UNITED STATES OF AMERICA)
) ss.
COMMONWEALTH OF PUERTO RICO)

WILLIAM H. ABBOTT, being first duly sworn on oath, deposes and says:

1. I am a member of the Bar of the State of Illinois (1928) and of the State of Minnesota (1942) and am presently engaged in the practice of law at St. Paul, Minnesota as a member of the firm of Carpenter, Abbott, Coulter & Kinney. Our firm has represented Minnesota Mining and Manufacturing Company ("3M") in patent matters since at least 1929. I have read the indictment returned by the grand jury at Danville, Illinois, on December 13, 1961 and am familiar with its contents. One or more members of our firm is familiar with all patent matters and patent licenses to which 3M is a party concerning the three product classifications mentioned in the indictment; *i.e.* pressure sensitive tape, magnetic recording media, and aluminum pre-sensitized lithographic plates.

2. I appeared as attorney for 3M in the patent infringement suit brought by Armour Research Foundation of Illinois Institute of Technology v. C. K. Williams & Co., Inc., Civil Action No. 3200 in the U.S. District Court for the Eastern District of Illinois, and I have read [fol. 72] the letter dated January 31, 1962 of Earl A. Jinkinson, Chief, Justice Department, Antitrust Division, to John T. Chadwell of Chicago, Illinois, regarding the above entitled criminal action. Based upon my knowledge and information, the allegations on page 2 of Mr. Jinkinson's letter are inaccurate in the following respects:

(a) 3M did not order, or even request, Armour Research Foundation to bring suit for patent infringement against C. K. Williams & Co. Inc. in the Eastern District of Illinois or elsewhere, nor did 3M join in the patent suit with Armour. Such suit was brought at Armour's volition and the complaint was filed with Armour Research Foundation as the sole plaintiff. 3M was joined as a party-plaintiff after the suit was filed upon motion by defendant Williams, who alleged that 3M should be made a party upon the ground that it was a licensee under the patent in suit.

(b) The patent infringement suit against C. K. Williams was conducted by Chicago patent counsel selected by Armour. I represented 3M in defending it against the counterclaim brought by C. K. Williams charging that Armour and 3M had violated the antitrust laws. The antitrust counterclaim was tried at the same time as the patent infringement suit and my participation in the prosecution of the patent infringement suit was incidental to my defense of 3M to the charges of violation of the antitrust laws.

(c) It is true that 3M's president, Herbert P. Buetow, testified in the C. K. Williams suit but his testimony was confined to evidence in rebuttal to the proof offered by Williams in support of its antitrust counterclaim. The counterclaim (based upon charges substantially identical to the allegations of Counts Four, Five and Six of the indictment) was dismissed by the Honorable William G. Juergens.

[fol. 73] 3. 3M has not participated as plaintiff or defendant or in any other manner in any patent infringement suit involving the product classifications set forth in the indictment brought or tried in the Eastern District of Illinois other than as described above. 3M has been plaintiff or defendant in some 37 patent infringement cases involving such products in districts other than the Eastern District of Illinois.

4. Examination of all patent licenses to which 3M is a party involving the product classifications set forth in the indictment reveals that no party to any such license

has its principal place of business in the Eastern District of Illinois.

/s/ William H. Abbott

Subscribed and Sworn to before me by William H. Abbott, of legal age, married, attorney, resident of St. Paul, Minnesota, personally known to me, this 7th day of March, 1962.

/s/ Herman W. Colberg
Notary Public

affidavit #574

Herman W. Colberg
Abogado
Notario
Puerto Rico

[fol. 74]

AFFIDAVIT OF JORGE MORALES YORDAN ATTACHED TO AFFIDAVIT OF WILLIAM H. ABBOTT

COMMONWEALTH OF PUERTO RICO
DEPARTMENT OF STATE
SAN JUAN, PUERTO RICO

I, JORGE MORALES YORDAN Acting, Secretary of State of Puerto Rico, DO HEREBY CERTIFY: That HERMAN W. COLBERG, whose official attestation appears to the annexed instrument, was on the day of the same, and is at present, a Notary Public in and for the Commonwealth of Puerto Rico, his authority as such being filed and registered in this Department; that he, as such Notary Public, is empowered to administer oaths, affidavits, or affirmations; to authorize affidavits or declarations of authenticity; to take acknowledgements of deeds and other instruments affecting land situate in the Commonwealth of Puerto Rico, the District of Columbia, or in the territories and possessions of the United States; to certify to, or to witness the truth or recognition of a signature, an oath, or any fact, act, or contract of a mere private nature affecting real or personal property; to certify contracts and other extra judicial instruments that are executed in his presence, and to draft original deeds and to issue copies thereof; that to all his official acts as such Notary Public full faith and credit may and ought to be given in all courts of justice and elsewhere; and having compared the seal and signature of the said HERMAN W. COLBERG to said attestation with his signature and seal registered in this Department pursuant to law, I verily believe same to be genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the Commonwealth of Puerto Rico, at the City of San Juan, this 7th day of March, in the year of our Lord one thousand nine hundred and sixty two.

Acting Secretary of State of Puerto Rico Jorge Morales Yordan

[SEAL]

[fol. 75]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

[Title Omitted]

AFFIDAVIT OF WILLIAM C. HUNT IN SUPPORT OF MOTION TO TRANSFER THIS ACTION TO DISTRICT OF MINNESOTA.

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

WILLIAM C. HUNT, being first duly sworn, on oath deposes and says:

1. I a man Attorney at Law licensed to practice by the Supreme Court of the State of Minnesota and am employed as an attorney in the Law Department of Minnesota Mining and Manufacturing Company ("3M"), defendant in the above entitled criminal action. I was employed by 3M on March 6, 1961, and since that time have had general responsibility for the production of documents in response to subpoenas issued by Federal Grand Juries convened at Danville, Illinois, and additional requests for documents from attorneys of the Midwest Office, Antitrust Division, United States Department of Justice, Chicago, Illinois. It has been my responsibility to make documents available for examination by Government attorneys, to deliver to them them the documents which they requested, to make copies thereof for retention by 3M, and in general to become familiar with all matters relating to the investigation by the Antitrust Division and the Grand Juries.

[fol. 76] 2. I have read the Indictment returned by the Grand Jury at Danville, Illinois, on December 13, 1961, against 3M and am familar with its contents.

3. I am informed and believe that the Indictment resulted from the investigations by the United States Department of Justice which began in 1945, at which time a representative of the Midwest Office of the Antitrust Divi-

sion of the Justice Department was first furnished with documents from files and records of 3M. Since that time up to, and including, December 13, 1961, 3M Company has furnished to the Government and the Grand Juries more than 15,000 documents. Copies of most of said documents have been retained by the 3M Company and are located in the Law Department offices in the 3M building, 900 Bush Avenue, St. Paul, Minnesota, or in the offices of the law firm of Chadwell, Keck, Kayser, Ruggles & McLaren, 135 South LaSalle Street, Chicago, Illinois. Those documents, as well as other files relating to the various investigations, occupy approximately ten file drawers. All of said documents will necessarily be needed at the place of trial of this suit.

4. As noted in the affidavit of John L. Connolly, filed herein, Patent Counsel files relating to patent infringement cases and patent licenses located in the offices of Carpenter, Abbott, Coulter and Kinney in St. Paul, Minnesota, occupy more than 84 file drawers. Most, if not all, of these documents will be needed at the site of trial of this suit.

5. Also located at the principal business offices of 3M Company in St. Paul, Minnesota, are literally thousands of file drawers of documents relating to the conduct of business of 3M in the manufacture and sale of products within the three classifications covered by the Indictment. In the central file room alone I estimate there are not less than 4,000 drawers of records and documents dealing with [fol. 77] these products. There are, in addition, in the various operating divisions concerned at least 300 to 400 file drawers of documents and records. It is not now possible to anticipate with any degree of accuracy each and every contention which the plaintiff will raise in support of the charges of the Indictment; hence, it is not possible to state with accuracy what quantities of the general files and records will be required at the scene of the trial of this case. Obviously there is a considerable bulk of these files which will not in any way be nedded such as, for example, personnel records and certain technical manufacturing data. On the other hand, a considerable quantity of this material may well be necessary. For example, several hundred file drawers of material consisting of invoices

and other shipping records showing the materials sold, the prices billed and received from the customer, and valuable in establishing certain market data, may well be needed in connection with defense of the charges. Likewise, over 20 file drawers contain analytical laboratory material relevant to establishing a bona fide good-faith belief on the part of 3M that certain products manufactured and marketed by various other companies would infringe the claims of the U.S. Letters Patent owned by 3M Company.

6. I am not personally familiar with the specific contents of each and every file drawer, nor to my knowledge is there any single person employed by 3M who is so familiar with such files and records. There are numerous persons employed by 3M at its principal place of business in St. Paul, Minnesota, in various executive, administrative, manufacturing, sales, marketing, technical, and research capacities who must be called on from time to time to locate specific files and records.

7. If this action were tried in the United States District Court for the District of Minnesota, then the numerous [fol. 78] persons familiar with the files and records would be readily available to quickly locate specific documents necessary to the defense of 3M. If the trial were held in the United States District Court for the Eastern District of Illinois, at Danville, Illinois, the defendant would be faced with two equally difficult alternatives:

On the one hand the defendant could ship only the bare minimum of its files from St. Paul to Danville and thereafter during the course of the trial attempt to supervise from Danville the location of files in St. Paul. Aside from the difficulties in marshalling files inherent in such a plan, the defendant would encounter great transportation problems securing delivery of the necessary files to Danville as the needs arose.

On the other hand, the defendant could liberally estimate what files might be needed and ship large quantities to Danville. Aside from the fact that much material would be shipped which would never be needed, this course would cause considerable disruption of the defendant's normal business operations. Files used in the ordinary course of business would be gone from the defendant's principal

business offices; all personnel familiar with the files would be required at the trial and, consequently, away from their normal duties even though never or only infrequently called upon for assistance. Furthermore, there is the substantial risk that when attempting to deal with such a large volume of material over long distances important documents could remain undiscovered in time to be of any useful evidentiary value.

8. Pursuant to my request, the Freight Traffic Department of 3M has advised me on the cost of shipping documents from St. Paul, Minnesota, to Danville, Illinois. Files and records may be shiped by various commercial carriers at various rates. However, files and records being ir- [fol. 79] replaceable, unlike ordinary freight, I have obtained information as to the rates for shipment in the safest possible commercial manner. I believe such manner of shipment to be by Railway Express Agency "Signature Service". Special care and custodianship over each and every piece of freight is provided by the carrier for material shipped by Signature Service. Documents would be packed in boxes capable of containing the contents of one ordinary office file drawer. The cost of shipment for each such box is $5.47 covering shipment from the 3M offices in St. Paul to any specifically designated delivery point in Danville. The cost of return shipment of such files from Danville to St. Paul, Minnesota, is also $5.47 per box.

/s/ William C. Hunt
WILLIAM C. HUNT

Subscribed and sworn to
before me this 7th day
of March, 1962.

/s/ Phyllis J. McGinnis
Notary Public

Phyllis J. McGinnis
Notary Public, Ramsey County, Minn.
My Commission Expires Sept. 8, 1965

[SEAL]

[fol. 80]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

[Title Omitted]

AFFIDAVIT OF ROBERT Z. HICKMAN IN SUPPORT OF MOTION TO TRANSFER THIS ACTION TO DISTRICT OF MINNESOTA.

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

ROBERT Z. HICKMAN, being duly sworn, on oath deposes and says as follows:

1. I am an attorney at law duly licensed to practice by the Supreme Court of Illinois and have been admitted to practice before this Court. I am a member of the firm of Gunn, Hickman & Kesler, with offices at 4 N. Vermilion Street, Danville, Illinois. Our firm has represented the defendant, Minnesota Mining and Manufacturing Company in the present litigation since November 29, 1961.

2. Our firm was engaged for this litigation by John T. Chadwell of the firm of Chadwell, Keck, Kayser, Ruggles & McLaren, 135 S. LaSalle Street, Chicago, Illinois, who will serve as the chief trial counsel in this cause. As appears in the affidavit of Glenn W. McGee, a member of that firm, trial counsel estimates that permanent office and housing facilities would have to be obtained in Danville for a trial staff of not less than fifteen lawyers and clerks and five executive officers of the defendant for the period of the trial. In addition, standby facilities for a minimum of 4 to 10 witnesses would have to be obtained for a part [fol. 81] of that period and it appears from the affidavit of William C. Hunt filed herein that facilities for persons familiar with 3M files may also have to be obtained for a portion of that period.

3. At the request of John L. Connolly, 3M's counsel, I have caused a search to be made in Danville for facilities which would provide living quarters for the trial staff and adequate office space for the files, office equipment, including desks, typewriters and reproduction machines which will be necessary to defense counsel during the trial of this cause. I have also ascertained approximate costs for equipping such offices and for hiring some local personnel to staff them.

4. Based on this investigation and to the best of my information and belief it appears that the monthly costs to obtain such facilities would be as follows:

Office Space	$1,200
Office Equipment and Supplies	1,400
Secretaries and Clerks	1,200
Living Accommodations	13,450
Miscellaneous Expense	250
	$17,500

/s/ Robert Z. Hickman

Subscribed and sworn to
before me this 7th day
of March, 1962.

/s/ Richard S. Rhodes
Notary Public
My Commission Expires August 17, 1965

[SEAL]

[fol. 82]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

[Title Omitted]

AFFIDAVIT OF GLENN W. MCGEE IN SUPPORT OF MOTION TO TRANSFER THIS ACTION TO DISTRICT OF MINNESOTA.

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

GLENN W. MCGEE, being first duly sworn on oath, deposes and says:

I am an attorney at law duly licensed to practice law by the Supreme Court of the State of Illinois and am presently a member of the firm of Chadwell, Keck, Kayser, Ruggles & McLaren, 135 South LaSalle Street, Chicago 3, Illinois. Our firm was first employed by Minnesota Mining and Manufacturing Company ("3M") on November 7, 1961 to represent 3M in connection with the investigation of the company's activities by the Danville, Illinois grand jury which resulted in the indictment of December 13, 1961. I have read the indictment and am familiar with its contents.

2. In the course of our preparations for trial of this case I have conversed with counsel for each of the alleged co-conspirators named in Counts Two, Five and Eight of the indictment in order to ascertain, among other things, whether any representatives of their clients testified before the Danville grand jury. I have been informed by such counsel and believe that approximately twenty-four former or present employees of these companies either testi-
[fol. 83] fied before the grand jury in Danville or were interrogated informally by counsel for the plaintiff at such counsel's offices in Chicago with respect to the subject matter of the indictment. I have further been informed and believe that not one of these persons resides in the Eastern

District of Illinois but rather that at least eleven of these witnesses reside in New Jersey or New York within reasonable proximity to the New York Metropolitan area, four are from the Chicago, Illinois area, four are from Massachusetts, and two or three spend their time between Florida or Arizona and the Eastern seaboard.

I have also obtained from sources which I consider reliable information concerning other witnesses, in addition to those connected with the alleged co-conspirators, who appeared before the grand jury at Danville or discussed with counsel for the plaintiff the subject matter of the indictment. In all my investigations. I have learned of no witnesses who resided in the Eastern District of Illinois. Based upon such information and investigation, I believe that no probable or potential witness for the plaintiff resides in the Sastern District of Illinois other than possible witnesses who have little if anything to do with the charges in the indictment who might be called in an attempt to prove venue in this district. Included among the locations where, I believe, such witnesses do reside are the following:

St. Paul, Minnesota	(1)
Chicago, Illinois area	(2)
New York City area	(8)
Boston, Massachusetts	(2)
Philadelphia, Pennsylvania	(1)
Reading, Pennsylvania	(1)
Kansas City, Missouri	(1)
San Francisco, California	(1)
Los Angeles, California	(1)

(Number of witnesses indicated in parentheses)

[fol. 84] 4. Paragraphs 13, 30 and 38 of the indictment charge that the principal places of business of 3M's alleged co-conspirators are in New Brunswick, New Jersey, Boston, Massachusetts; New Haven, Connecticut; New York, New York; Chicago, Illinois; and Niles, Illinois. Niles adjoins Chicago and is part of the Chicago metropolitan area. At the present time I lack sufficient knowledge from which to form a belief as to whether any of the alleged co-conspirators maintain places of business or own

or lease property within the Eastern District of Illinois, but I do know that all of them own and operate plants and divisions outside the Eastern District of Illinois, for example, Johnson & Johnson, the Kendall Company, and Johns-Manville Corporation all have plants and offices or divisions located in Chicago, Illinois.

5. Vol. 6, No. 3, of the "Official Airline Guide,: Quick Reference Ed. dated February 1, 1962 reveals that Danville, Illinois, is served by only one airline, namely, Lake Central Airlines and that except for Saturdays and Sundays there are a total of eight flights arriving daily in Danville. Three of these eight flights are from Chicago. There are no nonstop flights into Danville from any location east of Terre Haute, Indiana. There are no direct flights between St. Paul, Minnesota and Danville; the only practical route between those two points requires a stop in Chicago. The same source shows that the Minneapolis-St. Paul (International Airport) for Minneapolis and St. Paul is served by United Airlines, Eastern Airlines, Northwest Airlines, Western Airlines, Ozark Airlines, North Central Airlines and Braniff Airlines and more than 100 flights arrive daily at this airport. Attached hereto and marked Appendix A is a schedule of airplane flights and railroad trains between Chicago, Illinois and Danville, Ilinois and between Chicago and Minneapolis-[fol. 85] St. Paul (International Airport). This shows that there are 36 daily flights except Saturday and Sunday from Chicago to St. Paul. The "Official Airline Guide", *supra*, also shows that there is one nonstop flight daily from New York to Twin Cities, nine additional flights with one stop, seven with two stops and one with three stops. From New York City to Chicago there are forty nonstop flights daily except Saturday and Sunday.

6. From the publication entitled "Official Guide of the Railways" dated October, 1961, it appears that the Chicago and Eastern Illinois Railway and the Wabash Railroad are the only railroads servicing Danville with passenger service. Appendix A indicates that there are three trains daily originating in Chicago to the north and two trains daily originating in Detroit to the east which come into Danville. There are no through trains between St.

Paul, Minnesota and Danville; the only practical route by rail between those two points requires a stop and change of trains and stations in Chicago. Between Chicago and St. Paul there are eight trains operating daily, four on the Burlington Railway, three on the Milwaukee Railway and one on the Chicago and Northwestern Railway. The "Official Guide of the Railways", *supra*, shows four trains daily on the Pennslyvania Railroad between New York and Chicago, five on the New York Central, three on the Erie-Lackawanna, and two on the Nickel Plate.

7. I have examined personally copies of thousands of documents which were taken by the plaintiff from 3M's files and retained by the plaintiff for use in this litigation, but have not yet examined the copies of all such documents. Based on the examination of these documents and interviews with various 3M personnel and with counsel for the alleged co-conspirators, it appears at this time that 3M in its defense to the charges of the indictment will [fol. 86] rely heavily on documents in its files and testimony of key executives concerned with the three product classifications involved; *i.e.*, (1) pressure sensitive tapes, (2) magnetic recording media, and (3) aluminum presensitized lithographic plates. With the exception of a limited number of copies of the 3M documents retained by the plaintiff which are located in our offices in Chicago, all 3M documents which we know to be relevant at this time are located in St. Paul, Minnesota. Of the eleven 3M officers and employees summoned to appear before the grand jury at Danville, all reside in or around St. Paul, Minnesota with the exception of Mr. Louis F. Weyand who resides in San Francisco, California. As appears from the affidavits of Messrs. Connolly, Sampair, Cross, and Westbee filed herein, 3M executives whose presence will be required at the trial situs for preparation and presentation of the defense as well as patent counsel all reside in or near St. Paul, Minnesota.

8. In addition to documents and testimony of key executives, it may well be that as more is learned about the government's allegations by way of particulars or further discovery of documents, that a "view" of 3M facilities should be provided for the judge and/or jury who hears

this case. Such a view of the nature and extent of 3M's research and development facilities would be relevant to show that 3M's success in producing new and important products to the benefit of the public and the company has come from such research and development and not from the alleged improper methods specified in the indictment. In addition, a view will demonstate the efficiency with which the 3M products are actually manufactured, will help explain the superior quality of 3M products which the [fol. 87] defense will prove is one of the reasons why the public has preferred 3M products and made the company so successful.

9. Tables C-3a and D-1 attached to the Annual Report of the Direct of the Administrative Office of the United States Courts issued in September, 1961 show that as of June 30, 1961 case load per judge is much smaller in the District of Minnesota than in the Eastern District of Illinois. As of that date there were 312 civil cases and 15 criminal cases pending in the Eastern District of Illinois; there were 517 civil cases and 49 criminal cases pending in the District of Minnesota. Since there are four judges in the Minnesota district and only two in the Eastern District of Illinois the case load is 141.5 and 163.5, respectively. Tables C-5 and C-8 of the same report set forth the median time interval from filing to disposition in civil cases terminated during the fiscal year ending June 30 in which a trial was commenced and the median time interval from the time issue was joined to time of trial in civil cases in which a trial was completed during the fiscal year from these two districts as follows:

	Filing to Disposition	Issue to Trial
E.D. Ill.	15.9 months	10.1 months
D. Minn.	9.4 "	5.3 "

No comparable figures are available for criminal cases. However, it appears from the foregoing that no delay of trial would result from the transfer of this cause to the District of Minnesota because of docket congestion in said district.

10. Mr. John T. Chadwell of our office is in charge of the preparation and trial of this case. We anticipate that

in addition to Mr. Chadwell and myself, at least three other lawyers from our offices, and probably more, will [fol. 88] actively participate in the on-the scene preparation and actual trial. As is shown by the affidavit of John L. Connolly filed herein, two or three lawyers from his office in addition to one or two patent counsel for each of the product classifications involved in the indictment will also be present. The affidavits of Mr. Sampair, Mr. Cross and Mr. Westbee state that each of these executives believes it is necessary that two or three individuals closely connected with each of the product classifications covered by the indictment be available at the time of the trial. As a result, for each of the product classifications involved, a trial staff of from twelve to fifteen lawyers and executives will be required. To completely cover all the product classifications at one time would necessitate a trial staff of twenty to twenty-four lawyers and executives. Assuming that only one product classification is involved at any one time, secretaries and clerks familiar with the case and with our methods of procedure will increase the staff to not less than 20 persons for whom semi-permanent living and working facilities will have to be obtained in Danville should trial be held in the Eastern District of Illinois. Additional facilities for witnesses would likewise have to be obtained from time to time as would facilities for additional personnel such as accountants, statisticians or others whose services may be necessary to assist in the defense as the case develops.

/s/ Glenn W. McGee

Subscribed and Sworn to
before me this 9 day of
March, 1962.

/s/ Ellen Thomas
Notary Public

[SEAL]

[fol. 89]

Appendix A to Affidavit of Glenn W. McGee

I. Scheduled Commercial Airline Flights.
LC—Lake Central Airlines
U—United Airlines
NC—North Central Airlines
E—Eastern Airlines
NW—Northwest Orient Airlines

Schedule 1. Chicago, Illinois (O'Hare Field) to Danville, Illinois

Line & Flight No.	Lv. Chicago	Arr. Danville
LC—133	1:45 P.M.	2:50 P.M.
LC—503	10:10 A.M.	11:15 A.M.
LC—137	6:40 P.M.	7:45 P.M.

Schedule 2. Danville, Illinois to Chicago, Illinois (O'Hare Field)

Line & Flight No.	Lv. Danville	Arr. Chicago
LC—512	11:45 A.M.	12:50 P.M
LC—303	7:35 A.M.	8:40 A.M.
LC—318	5:05 P.M.	6:10 P.M.

Schedule 3. Chicago, Illinois (O'Hare Field) to Minneapolis—St. Paul International Airport

Line & Flight No.	Lv. Chicago	Arr. St. Paul
NW—45	1:40 A.M.	2:57 A.M.
NW—919	4:05 A.M.	5:31 A.M.
E—154	4:25 A.M.	5:57 A.M.
NW—405	7:00 A.M.	10:27 A.M.
NC—467	7:30 A.M.	11:19 A.M.
NC—459	7:45 A.M.	11:37 A.M.
NW—415	8:00 A.M.	9:05 A.M.
U—631	8:00 A.M.	9:15 A.M.
NW—425	9:45 A.M.	11:02 A.M.
U—755	10:00 A.M.	11:07 A.M.
NC—451	10:30 A.M.	2:36 P.M.
NW—21	11:15 A.M.	12:32 P.M.
U—655	11:45 A.M.	1:00 P.M.
E—122	11:50 A.M.	1:08 P.M.
NW—127	11:50 A.M.	3:12 P.M.

[fol. 90]

NW—125	12:10 P.M.	3:15 P.M.
NW—701	1:10 P.M.	2:09 P.M.
NC—457	1:15 P.M.	4:52 P.M.
U—667	1:25 P.M.	2:40 P.M.
NW—447	4:00 P.M.	5:09 P.M.
NW—703	4:50 P.M.	6:17 P.M.
U—751	4:55 P.M.	6:02 P.M.

Schedule 3: (Continued)

Line & Flight No.	Lv. Chicago	Arr. St. Paul
E—120	5:55 P.M.	7:31 P.M.
NC—455	6:00 P.M.	9:32 P.M.
NW—481	6:15 P.M.	7:24 P.M.
NC—469	6:30 P.M.	10:23 P.M.
NW—475	6:45 P.M.	9:37 P.M.
NW—715	7:20 P.M.	8:19 P.M.
U—609	7:25 P.M.	8:40 P.M.
U—657	7:45 P.M.	9:00 P.M.
NW—711	7:50 P.M.	11:00 P.M.
NC—453	8:00 P.M.	12:39 A.M.
E—142	8:40 P.M.	10:55 P.M.
NW—307	8:50 P.M.	10:25 P.M.
U—653	10:10 P.M.	11:25 P.M.
NW—493	10:30 P.M.	12:20 A.M.

Schedule 4. Chicago, Illinois (Midway Airport) to Minneapolis-St. Paul International Airport.

Line & Flight No.	Lv. Chicago	Arr. St. Paul
U—201	2:30 P.M.	4:14 P.M.
NW—211	4:20 P.M.	5:47 P.M.
U—475	5:15 P.M.	7:05 P.M.
NW—459	5:45 P.M.	7:32 P.M.

Schedule 5. Minneapolis-St. Paul (International Airport) to Chicago (O'Hare Airport)

Line & Flight No.	Lv. St. Paul	Arr. Chicago
NC—456	6:00 A.M.	9:35 A.M.
NW—408	6:30 A.M.	8:57 A.M.
U—600	7:00 A.M.	8:05 A.M.
NC—450	7:00 A.M.	10:40 A.M.
NW—700	7:05 A.M.	8:05 A.M.
NW—702	7:05 A.M.	8:05 A.M.
NW—704	7:30 A.M.	9:23 A.M.

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E—121	8:00 A.M.	9:23 A.M.
NW—708	8:30 A.M.	9:45 A.M.
NC—466	8:45 A.M.	12:10 P.M.
U—654	9:00 A.M.	10:05 A.M.
E—131	9:45 A.M.	11:57 A.M.
U—602	10:15 A.M.	11:20 A.M.
NW—420	11:00 A.M.	1:10 P.M.
NC—452	12:30 P.M.	3:50 P.M.
NW—428	12:45 P.M.	1:41 P.M.
U—756	1:00 P.M.	2:00 P.M.
U—656	2:00 P.M.	3:05 P.M.
NC—458	2:00 P.M.	6:30 P.M.

Schedule 5. (Continued)

Line & Flight No.	Lv. St. Paul	Arr. Chicago
E—111	2:35 P.M.	3:46 P.M.
NW—444	2:50 P.M.	5:49 P.M.
NW—436	3:00 P.M.	3:57 P.M.
NC—468	4:00 P.M.	7:35 P.M.
U—668	4:00 P.M.	5:20 P.M.
NW—456	4:30 P.M.	5:31 P.M.
NW—476	5:45 P.M.	7:00 P.M.
NC—454	6:15 P.M.	10:10 P.M.
NW—482	6:35 P.M.	8:14 P.M.
U—754	7:10 P.M.	8:10 P.M.
U—606	9:00 P.M.	10:05 P.M.
NW—112	9:55 P.M.	11:10 P.M.
E—159	10:00 P.M.	11:23 P.M.
NW—114	10:30 P.M.	11:45 P.M.

Schedule 6. Minneapolis-St. Paul International Airport to Chicago, Illinois (Midway Airport)

Line & Flight No.	Lv. Chicago	Arr. St. Paul
U—224	9:45 A.M.	11:16 A.M.
U—202	12:00 Noon	1:31 P.M.
NW—718	2:20 P.M.	4:30 P.M.

NOTE: All North Central flights involved make at least one intermediate stop; four Northwest flights make intermediate stops.

Verification of the above flights can be found in the Quick Reference Edition of February, 1962, "Official Guide of Airlines".

[fol. 92]

II. Scheduled Passenger Train Service.

Schedule 1. Chicago, Illinois to Danville, Ilinois

Railway	Lv. Chicago	Arr. Danville
C & EI	3:45 P.M.	5:54 P.M.
C & EI	8:00 P.M.	10:29 P.M.
C & EI	10:45 P.M.	12:56 A.M.

Schedule 2. Danville, Illinois to Chicago, Illinois.

Railway	Lv. Danville	Arr. Chicago
C & EI	1:42 A.M.	4:25 A.M.
C & EI	7:05 A.M.	9:45 A.M.
C & EI	5:05 P.M.	7:30 P.M.

Schedule 3. Chicago, Illinois to St. Paul, Minnesota

Railway	Lv. Chicago	Arr. St. Paul
Burlington	9:00 A.M.	3:20 P.M.
Milwaukee	10:30 A.M.	6:15 P.M.
Burlington	12:10 P.M.	6:55 P.M.
Northwestern	12:30 P.M.	7:10 P.M.
Milwaukee	1:00 P.M.	7:35 P.M.
Burlington	3:00 P.M.	9:45 P.M.
Burlington*	10:30 P.M.	7:25 A.M.
Milwaukee*	11:00 P.M.	7:35 A.M.

Schedule 4. St. Paul, Minnesota to Chicago, Illinois

Railway	Lv. St. Paul	Arr. Chicago
Burlington	7:15 A.M.	2:00 P.M.
Milwaukee	8:20 A.M.	2:55 P.M.
Burlington	8:25 A.M.	2:00 P.M.
Northwestern	12:30 P.M.	7:30 P.M.
Milwaukee	12:54 P.M.	7:20 P.M.
Burlington	5:00 P.M.	11:30 P.M.
Milwaukee*	11:25 P.M.	7:45 A.M.
Burlington*	11:30 P.M.	8:10 A.M.

*All trains indicated with asterisk have Pullman accommodations.

Verification of the above train schedules may be found in January, 1962, issue of the "Official Railway Guide". Effective at least on February 21, 1961 C & EI train #9 from Chicago to Danville and #10 from Danville to Chicago were cancelled and are not shown here although shown in the "Official Railway Guide".

[fol. 93]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

Criminal Action No. 61-73-D

UNITED STATES OF AMERICA, PLAINTIFF

v.

MINNESOTA MINING AND MANUFACTURING COMPANY, DEFENDANT

AFFIDAVIT OF EARL A. JINKINSON IN OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER ACTION TO THE DISTRICT OF MINNESOTA

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

EARL A. JINKINSON, being duly sworn, deposes and says that:

He is the Chief of the Midwest Office of the Antitrust Division of the Department of Justice. He knows either from his own personal knowledge or from the investigation made by persons working under his direction that all of the facts stated in this affidavit are true, except those which are said to be based upon information and belief, and as to these, he believes the same to be true.

Affiant states as follows:

1. Attorneys under the supervision of affiant made a preliminary investigation of the magnetic recording tape industry, following the receipt of a complaint originating in East St. Louis, Illinois, during the year 1958. As a result of said investigation, grand jury proceedings were initiated in the Eastern District of Illinois at Danville. As additional complaints were received concerning conditions prevailing in the pressure sensitive tape and aluminum lithographic plate industries, the investigation was [fol. 94] broadened. Thus, the initial investigation started in the Eastern District of Illinois then proceeded to grand

jury hearings lasting over two years in that district, resulting in the return of an indictment on December 13, 1961.

2. Affiant first joined the Antitrust Division of the Department of Justice on August 11, 1941, and has been the Chief of the Midwest Office of the Antitrust Division since April 1, 1954. From 1941 to the present date, he has been actively engaged as a trial attorney in the preparation and litigation of antitrust actions for the Department of Justice, including those involving abuse of patents. The evidence in this case shows that Minnesota has deliberately initiated patent infringement actions in judicial districts considered by it to be most favorable to its interests as patentee in complete disregard of the location of the principal place of business or the convenience of witnesses of either its principal adverse party or of itself. Affiant believes that this tactic, commonly known as "forum shopping," has been employed more consistently and vigorously by Minnesota than by any other company affiant has known during his twenty years of experience with the Antitrust Division.

3. Three lists of patent infringement suits filed by Minnesota or requested to be filed by Minnesota, containing information available in public records, have been prepared by attorneys under affiant's supervision and are attached hereto as Exhibits A, B, and C. Said charts reveal the extent to which Minnesota has selected forums far distant from the principal location of the principal adverse party in interest. Also attached hereto as Exhibits D and E are listings, similarly prepared, of actions for declaratory judgments brought against Minnesota by competing manufacturers who, affiant is informed and believes, initiated such actions in order to avoid the incon- [fol. 95] venience and results of Minnesota's selective filings in distant judicial districts.

4. Minnesota, as shown by Exhibits A, B, and C hereto attached, has initiated (or caused Armour to initiate) thirty-four patent infringement suits, and twenty-four of these have been filed in judicial districts *other* than those where Minnesota's principal adverse party in interest was located. Not one patent infringement suit was filed in the District of Minesota.

5. In the trial of its numerous cases, affiant is informed and believes that Minnesota caused to be transported to distant forums numerous documents, including patent files, numerous executives, scientists, attorneys, and equipment; that it hired local counsel; that it had to find housing and office quarters for its large staff of attorneys and witnesses, a number of whom were present for extended periods of time as a number of said trials exceeded a month in duration. For example, the trial in *Armour Research Foundation and Minnesota Mining and Manufacturing Company* v. *C. K. Williams and Co.*, an action sponsored by Minnesota, continued in East St. Louis, Illinois, for four weeks [280 F. 2d 499 (C.A. 7, 1960)].

6. Affiant is informed and believes that, notwithstanding Mr. William H. Abbott's affidavit to the contrary, Minnesota did request Armour to file patent infringement actions against C. K. Williams and Co., Technical Tape Corporation, and Orradio Industries, Inc. Reference is made to findings Nos. 5, 8, 9, and 10 entered by Judge Juergens in the *C. K. Williams* case, 170 F. Supp. 871, 888 (E.D. Ill., 1959).

7. Minnesota is not a corporation incapable of properly defending itself in this case in an out-of-State forum by reason of any financial considerations. Affiant is informed and believes that Minnesota's 1961 sales approximated [fol. 96] $608,000,000 and its earnings exceeded $70,000,000 (see Moody's Investors Service report for February 2, 1962).

8. Affiant is informed and believes that William L. McKnight, Chairman of the Board of Minnesota, maintains three permanent residences in the cities of St. Paul, Minnesota; New York, New York; and Miami Beach, Florida.

9. Affiant will not extend this record by attempting to counter the numerous opinions and speculations and irrelevant matters treated in defendant's affidavits. However, with regard to the statements concerning patent license negotiations, affiant states that such negotiations *did* take place in the Eastern District of Illinois, and the Government's evidence will so show.

10. Owing to the vow of secrecy binding upon him, affiant may not reveal the evidence given before the federal grand juries in Danville, Illinois. As a generality, how-

ever, it is a fact that such evidence discloses that the conduct of Minnesota and its co-conspirators did have a *substantial* effect upon the residents of the Eastern District of Illinois and the neighboring areas, and a number of said residents will be called to testify in the Government's behalf.

11. Contrary to the avowals in defendant's affidavits, trial in Danville will be much more convenient to the Government and its witnesses than trial in the District of Minnesota. While affiant will not reveal their home locations, he will state that a substantial number of the Government's witnesses live within a 300-mile radius of Danville, Illinois, whereas only one or two of its presently contemplated witnesses live within a 300-mile radius of St. Paul-Minneapolis, and they are minor witnesses. Danville is substantially closer and more convenient for the majority of the key Government witnesses. Contrary to defendant's assumptions, Government counsel travel by [fol. 97] ca. to Danville from Chicago in about 2½ to 3 hours as compared with a full day's drive to St. Paul, Minnesota. Defendant also overlooks the fact that a large number of Government witnesses also travel by car.

12. Affiant is informed and believes that the return of this indictment has not halted Minesota's illegal activities and that Minnesota persists in continuing the licensing arrangements and a number of other practices described in the indictment; thus Minnesota's competitors continue to be coerced and restrained as a result of its conduct. Speedy action is required to unfetter these industries, as such conduct has greatly weakened the financial capacity of certain competitors.

.....

EARL A. JINKINSON

Subscribed and sworn to before me
this 31st day of March 1962.

.....

Notary Public

My commission expires March 22, 1965.

[fol. 98]

EXHIBIT A TO AFFIDAVIT OF EARL A. JINKINSON

Patent Infringement Suits Filed by Minnesota From 1932 to Date — Pressure Sensitive Tape

Defendants	Real Party in Interest	Product	Filing Date and Number of Case	District in which Filed	Principal Place of Business of Real Party in Interest
1. The Revolite Corporation (a competitor) Johnson and Johnson (parent of Revolite)	Johnson and Johnson	Paper Masking Tape	2/27/32 Civil 4586	D. of New Jersey	New Brunswick, New Jersey
2. National Tape Company (a Minnesota competitor)	National Tape Co.	Paper Masking Tape	7/23/34 Eq. 354-J	S.D. of California	Los Angeles, California
3. Brown Company (a supplier of paper to Revolite)	Johnson and Johnson	Paper Masking Tape	11/5/34 Civil 984	S.D. of Maine	New Brunswick, New Jersey
4. Vellumoid Company (a supplier of paper to Revolite)	Johnson and Johnson	Paper Masking Tape	11/5/34 Eq. 4054	D. of Mass.	New Brunswick, New Jersey
5. Endura Mfg. Co. (a supplier of paper to Revolite)	Johnson and Johnson	Paper Masking Tape	11/16/34 Civil 8385	E.D. of Pa.	New Brunswick, New Jersey
6. Johnson and Johnson; The Revolite Corporation; Insulation Mfgrs. Corp. (a Revolite distributor)	Johnson and Johnson	Paper Masking Tape	3/22/35 Civil 14382	N.D. of Illinois	New Brunswick, New Jersey

[fol. 99]

Defendants	Real Party in Interest	Product	Filing Date and Number of Case	District in which Filed	Principal Place of Business of Real Party in Interest
7. Pacific Treating Mills and others (relationship unknown)	Unknown	Paper Masking Tape	11/17/37 Eq. 1286 H	S.D. of California	Unknown
8. Ever-Ready Tape Co.; American Tape Co.; (relationship unknown)	Unknown	Paper Masking Tape	2/18/41 Eq. 1412	S.D. of California	Unknown
9. International Plastics Corp. (a competitor) and David A. Smart (its president)	International Plastics Corporation	Cellophane Tape	2/16/44 Civil 44 C 202	N.D. of Illinois	Morristown, New Jersey
10. Pax Tape Sales Co.; Harve Ferrill and Co.; Bulkley Dunton and Co., and Cofax Corporation. (Cofax was a competing manufacturer, and the others defendants were its distributors)	Cofax Corporation	Cellophane Tape	5/29/45 Civil 45 C 846	N.D. of Illinois	Lynbrook, New York
11. Freydberg Bros.-Strauss Co. (a New York distributor for Cofax)	Cofax Corporation	Cellophane Tape	5/31/45 Civil 45 C 862	N.D. of Illinois	Lynbrook, New York
12. Neisner Bros. Inc. (a distributor) and Eugen Dahm and Sons (a Minnesota competitor)	Eugen Dahm & Sons	Cellophane Tape	11/7/51 Civil 51 C 1789	N.D. of Illinois	Ontario, Canada (Neisner Bros. hq. location New York City)
13. Technical Tape Corporation (a Minnesota competitor)	Technical Tape	Cellophane Tape	9/11/52 Civil 52 C 1973	N.D. of Illinois	New Rochelle, New York
14. Earl H. Ebert Company (a distributor for Technical Tape)	Technical Tape Corp.	Cellophane Tape	9/15/52 Civil 7780	W.D. of Missouri	New Rochelle, New York

[fol. 100]

Defendants	Real Party in Interest	Product	Filing Date and Number of Case	District in which Filed	Principal Place of Business of Real Party in Interest
15. Sears Roebuck & Co. (a distributor for Plymouth Rubber Company, a Minnesota competitor, who later intervened to defend)	Plymouth Rubber Company	Vinyl Plastic Tape	8/3/54 Civil 878 G	M.D. of No. Carolina	Canton, Massachusetts
16. Pine State Electric Supply Co.; The Noland Company, Inc.; Scott-Parish Electric Supply Co.; Dixie Radio Supply Company of Charlotte, Inc. (distributors for Plymouth Rubber)	Plymouth Rubber Company	Vinyl Plastic Tape	8/3/54 Civil 879 G	M.D. of No. Carolina	Canton, Massachusetts
17. Plymouth Rubber Company (a Minnesota competitor) and Hawkins Electric Co., Complete Electrical Supply Co., and Shumway-Fresen Co. (distributors for Plymouth Rubber)	Plymouth Rubber Company	Vinyl Plastic Tape	8/4/54 Civil 54 C 1115	N.D. of Illinois	Canton, Massachusetts
18. Technical Tape Corporation (a Minnesota competitor)	Technical Tape Corporation	Vinyl Plastic Tape	8/4/54 Civil 54 C 1116	N.D. of Illinois	New Rochelle, New York
19. Superior Insulating Tape Company (a distributor for Plymouth Rubber)	Plymouth Rubber Company	Vinyl Plastic Tape	8/4/54 Civil 9907(2)	E.D. of Missouri	Canton, Massachusetts
20. Vernon Chemical Co. (a private label customer of Technical Tape Corp.)	Technical Tape Corporation	Cellophane Tape	10/17/55 Civil 104-243	S.D. of New York	New Rochelle, New York

[fol. 101]

Defendants	Real Party in Interest	Product	Filing Date and Number of Case	District in which Filed	Principal Place of Business of Real Party in Interest
21. United States Rubber Co. (a private label customer of Plymouth Rubber) Lowder Hardware Co. and Rockingham Hardware Co. (distributors for U. S. Rubber Co.)	Plymouth Rubber Co.	Vinyl Plastic Tape	6/15/56 Civil 336-R	M.D. of No. Carolina	Canton, Massachusetts
22. Goodyear Tire and Rubber Co. (a private label customer of Plymouth Rubber) and Carolina Tire Company of Thomasville, N. C., Inc. (a distributor for Goodyear)	Plymouth Rubber Company	Vinyl Plastic Tape	7/5/56 Civil 1026 G	M.D. of No. Carolina	Canton, Massachusetts
23. Acme Paper Co. (a distributor for Technical Tape Corp.)	Technical Tape Corporation	Cellophane Tape	8/17/56 Civil 35,772	N.D. of California	New Rochelle, New York
24. American Tuck Corp. (a distributor for Technical Tape Corp.)	Technical Tape Corporation	Cellophane Tape	9/5/56 Civil 112-253	S.D. of New York	New Rochelle, New York
25. Permacel LePage, Inc., and Johnson and Johnson (Minnesota competitor and its parent company)	Johnson and Johnson	Vinyl Plastic Tape	11/15/57 Civil 57 C 1888	N.D. of Illinois	New Brunswick, New Jersey
26. Shuford Mills, Inc. (a Minensota competitor)	Shuford Mills, Inc.	Carton Sealing Paper Tape	7/30/58 Civil 380	W.D. of No. Carolina	Hickory, North Carolina

[fol. 102]

EXHIBIT B TO AFFIDAVIT OF EARL A. JINKINSON

Patent Infringement Suits Filed by Minnesota From 1955 to Date — Presensitized Aluminum Lithographic Plates

Defendants	Real Party in Interest	Filing Date and Number	District in which Filed	Principal Place of Business of Real Party
1. A. B. Dick Co. (a Minnesota competitor)	A. B. Dick Co.	7/27/55 Civil 55 C 1118	N.D. of Illinois	Niles, Illinois
2. Harris-Intertype Corp., Lithoplate, Inc. Lithoplate, subsidiary of Harris, is a Minnesota competitor)	Harris-Intertype Corporation	5/8/58 Civil 58 C 815	N.D. of Illinois	Cleveland, Ohio
3. Polychrome Corporation; Dan Wayne, Ed Durak, and Ray McCarton (a competitor and its three Chicago area salesmen)	Polychrome Corporation	8/1/58 58 C 1445	N.D. of Illinois	Yonkers, New York
4. Carpenter Printing Co., Inc.; Ellison E. Carpenter, Paul F. Carpenter (a user of Polychrome plates and its officers)	Polychrome Corporation	8/6/58 Civil 34,709	N.D. of Ohio	Yonkers, New York
5. Bewal, Inc.; Benjamin Edwards (a Polychrome distributor and its manager)	Polychrome Corporation	8/7/58 Civil W-1640	D. of Kansas	Yonkers, New York

[fol. 103]

Exhibit C to Affidavit of Earl A. Jinkinson

Patent Infringement Suits Filed by Armour at Minnesota's Request From 1955 to Date* — Magnetic Recording Tape

Defendants	Real Party in Interest	Filing Date and Number	District in which Filed	Principal Place of Business of Real Party
1. C. K. Williams and Co. Inc. (a supplier of Minnesota's competitors)	C. K. Williams	5/31/55 Civil 3200	E.D. of Illinois	East St. Louis, Illinois
2. Technical Tape of Illinois, Inc., Technical Tape Corporation, and Newark Electric Co. (a Minnesota competitor and two of its distributors)	Technical Tape Corporation	5/27/55 Civil 55 C 781	N.D. of Illinois	New Rochelle, New York
3. Orradio Industries, Inc. (a Minnesota competitor)	Orradio Industries	4/13/56 Civil 381 E	M.D. of Alabama	Opelika, Alabama

* In each of these cases, Minnesota was subsequently added as a party plaintiff.

[fol. 104]

EXHIBIT E TO AFFIDAVIT OF EARL A. JINKINSON

Declaratory Judgment Actions Brought by Competing Pressure Sensitive Tape Manufacturers Against Minnesota From 1945 to Date

Plaintiff	Plaintiff's Principal Place of Business	Product	Filing Date and Number	District in which Filed
Kendall Company	Boston, Massachusetts	Cellophane Tape	3/15/45 Civil 536	D. of Delaware
Cofax Corporation	Lynbrook, New York	Cellophane Tape	June 1945 Civil 81-670	S.D. of New York
Technical Tape Corporation	New Rochelle New York	Cellophane Tape	11/17/51 Civil 71-129	S.D. of New York
Technical Tape Corporation	New Rochelle New York	Cellophane Tape	10/20/53 Civil 88-265	S.D. of New York
Johns-Manville Corp. and Van Cleef Bros., Inc.	New York, New York	Vinyl Plastic Tape	11/17/54 Civil 1664	D. of Delaware
Technical Tape Corporation	New Rochelle New York	Acetate Fibre Tape	4/23/56 Civil 359-56	D. of New Jersey
Johnson & Johnson and Permacel Tape Corp.	New Brunswick New Jersey	Vinyl Plastic Tape	6/20/56 Civil 56 C 1051	N.D. of Illinois
Plymouth Rubber Company	Canton, Massachusetts	Vinyl Plastic Tape	12/31/58 Civil 58-1222 M	D. of Mass.

EXHIBIT D TO AFFIDAVIT OF EARL A. JINKINSON

Declaratory Judgment Brought by Completing Magnetic Recording Tape Manufacturers Against Minnesota

Plaintiff	Plaintiff's Principal Place of Business	Filing Date and Number	District in which Filed
Audio Devices, Inc.	New York,	6/8/55 Civil 101-140	S.D. of New York

[fol. 105]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

[Title Omitted]

AFFIDAVIT OF HOWARD L. FINK IN OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER ACTION TO THE DISTRICT OF MINNESOTA.

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

HOWARD L. FINK, being first duly sworn, deposes and says:

That he is employed as a trial attorney assigned to the Midwest Office of the Antitrust Division of the Department of Justice. That pursuant to his duties, affiant traveled to St. Paul and Minneapolis, Minnesota, and there personally examined the personnel and documents of the United States District Court for the District of Minnesota. The deponent spoke to Lawrence R. Tapper, Deputy Clerk, United States District Court, District of Minesota, in his office in St. Paul, Minnesota; William H. Eckley, Chief Deputy Clerk, United States District Court, District of Minnesota, in his office in Minneapolis, Minnesota; and Miles W. Lord, United States Attorney, District of Minnesota, in his office in Minneapolis, Minnesota.

[fol. 106]

I.

FACTS OBTAINED FROM LAWRENCE R. TAPPER

On March 23, 1962, affiant interviewed Lawrence R. Tapper in his office in the United States Courthouse at St. Paul, Minnesota. Mr. Tapper stated as follows:

1. A Monthly Statistical Report of Clerks of United States District Courts is prepared by the District Clerk's office in the District of Minesota.

2. Said reports were prepared by him in the month of February 1962 and Exhibits A, B, C, and D attached hereto are true copies of the aforesaid Monthly Statistical Reports of Clerks of United States District Courts.

3. The said reports disclose the following total as to the District of Minnesota: On February 28, 1962, there were pending 199 civil cases in the First, Second, Third, and Sixth Divisions of the United States District Court for the District of Minnesota. The Fourth and Fifth Divisions are located in Minneapolis and Duluth, respectively.

Mr. Tapper and affiant together personally examined the records pertaining to the dockets of the several divisions of the United States District Court for the District of Minnesota. This examination revealed that:

1. There are at the present time 67 criminal cases pending in the First, Second, Third, and Sixth Divisions of the United States District Court for the District of Minnesota.

2. There are 61 criminal cases now pending in the Fourth Division of the District of Minnesota sitting in Minneapolis, and additional criminal cases may be pending in the Fifth Division sitting in Duluth; however, the latter figures are not available.

3. The above mentioned figures do not include 50 additional indictments already returned during the month of [fol. 107] March 1962 by the grand jury sitting in the District of Minnesota.

4. The cases of al six divisions are heard by the four judges sitting in Minneapolis and St. Paul (without reference to divisions) and the great bulk of cases are tried in either Minneapolis or St. Paul.

5. There were 552 civil cases pending in the District of Minnesota on February 28, 1962.

6. Sixty-two of the civil cases pending in the First, Second, and Third Divisions are over one year old.

Lawrence R. Tapper further stated to affiant as follows:

1. That criminal cases in which the defendant is held in custody are handled first and that prolonged cases in which no natural person is being charged would normally be placed at the bottom of the docket;

2. That the next term of Court will begin in the first or second week in April and will run until the first or second week in November at which time a new term will begin;

3. That if the instant case were transferred, it could not be placed upon the April 1962 court calendar as that calendar has already been composed.

II

FACTS OBTAINED FROM WILLIAM H. ECKLEY

On March 22, 1962, affiant interviewed William H. Eckley in his office in the United States Courthouse at Minneapolis, Minnesota. Mr. Eckley stated as follows:

1. The Fourth Division of the District of Minnesota is heavily burdened and there is a backlog of cases now pending. At the call of the calendar on March 6, 1962, there were 61 criminal cases pending in the Fourth Division of the District of Minnesota.

2. Four lengthy criminal actions now being processed may effect an even heavier backlog in the District of [fol. 108] Minnesota during this term. One of these prolonged cases is a criminal action brought by the Department of Justice under the antitrust statutes.

3. It is estimated that three of the four mentioned cases will last from four to six weeks trial time and another will last at least three weeks. An additional grand jury investigation now being conducted by the Antitrust Division of the Department of Justice in the District of Minnesota may result in yet another antitrust case in the Fourth Division of the District of Minnesota, adding to this burden.

4. It is the policy of the United States District Court for the District of Minnesota to place cases such as the instant one at the end of the docket.

5. It was his belief that this case probably would not be brought to trial within a year of it is transferred to the District of Minnesota.

III

FACTS OBTAINED FROM MILES W. LORD

On March 22, 1962, affiant interviewed Miles W. Lord in his office in the United States Courthouse at Minneapolis, Minnesota. Mr. Lord stated as follows:

1. He is the United States Attorney for the District of Minnesota and he and his assistants must try all cases for the entire district.

2. He has six Assistant United States Attorneys and eight clerical aids (including stenographers).

3. His entire professional and clerical staff are extremely overburdened by the present caseload in the District of Minnesota. That in addition to his own assistants, there are presently already seven Antitrust Division attorneys from Washington, D. C. now using his offices in St. Paul and Minneapolis to conduct trial and grand jury [fol. 109] investigations under the antitrust laws. There are also, several post office inspectors and four Internal Revenue Service agents now using the office space and secretarial help in the United States Attorney's office in the District of Minnesota.

4. Said outside Government personnel are working on prolonged cases and will be using his office and clerical aids for an indefinite period of time. Because of the critical shortage of office space and secretarial help, it may not be possible to accommodate any additional Antitrust Division attorneys in Minneapolis, such as the staff which would be trying this case.

IV

PERSONAL FINDINGS

From his personal examination of the files and records, affiant further states:

1. That he has examined the Annual Report of the Director of the Administrative Office of the United States Courts, 1961, which covers the fiscal year July 1, 1960 through June 30, 1961; and has also examined the comparable figures, as of February 28, 1962 (see Exhibits A, B, C, and D attached hereto). The annual report for

1961 shows that there were 523 civil cases pending on June 30, 1961 in the District of Minesota* and the February 28, 1962 report shows that at this later date there were 552 cases pending in the District of Minnesota. Thus, [fol. 110] the number of civil cases pending in the District of Minnesota has increased by 29 cases during the past eight months.

2. There were also pending in the District of Minnesota in March 1962 a total of 128 criminal cases, not including the criminal cases in the Fifth Division, which figure was not available to affiant. Thus, the total known criminal and civil cases pending in the District of Minnesota amounted to 680.

3. That by dividing the total of 680 cases by the number of judges sitting in the District (4), it is determined that the average caseload per judge in the District of Minnesota is at least 170 cases.

4. That in the opinion expressed by Messrs. Lawrence R. Tapper, William H. Eckley, and Miles W. Lord, the growing backlog in the District of Minnesota will increase to an even larger extent during the coming term of Court because of four protracted criminal cases now on the docket.

5. That in the event this case were to be transferred to the District of Minnesota, there is no likelihood of its being placed upon the calendar of the Spring 1962 Term of court. The best that can be reasonably anticipated is that it will be placed upon the Fall 1962 Term.

6. That, because of the policy of that district to place criminal cases not involving an individual at the end of the docket, and particularly protracted cases, it is probable that, while the case may be called during the Fall 1962 Term (which ends in April 1963) if there are motions to be heard, the case will go over to the Spring 1963 Term before being tried.

---

* It may be noted that said figures differ from those recited in the affidavit of Glenn W. McGee. This is due to the fact that Mr. McGee's figures were taken from the temporary early edition of the Annual Report, whereas the recently published permanent report contains the corrected official figures.

[fol. 111]

V

FACTS OBTAINED FROM CARL J. WERNER

On March 27, 1962, the affiant interviewed Carl J. Werner, Clerk of the District Court for the Eastern District of Illinois, in his office in Danville, Illinois. Mr. Werner stated as follows:

1. A Monthly Statistical Report of Clerks of United States District Courts is prepared by the District Clerk office in the Eastern District of Illinois.

2. Said reports were prepared by him in the month of February 1962 and Exhibit E attached hereto is a true copy of the aforesaid Monthly Statistical Report of Clerks of United States District Courts.

There are only two criminal cases now pending and awaiting trial in the Eastern District of Illinois at Danville, one of which is the instant case. The cases pending in Danville, Illinois will be tried by Chief Judge Platt and those pending in East St. Louis, Illinois will be tried by Judge William G. Juergens.

VI

PERSONAL FINDINGS

The affiant further states:

1. He has examined the Annual Report of the Director of the Administrative Office of the United States Courts, 1961, which covers the fiscal year July 1, 1960 through June 30, 1961. It shows that as of June 30, 1961 there were 327 civil cases pending in the Eastern District of Illinois (Table C-1, p. 236, Annual Report of the Director).

2. The total number of cases pending in the Eastern District of Illinois is not an accurate guide to the caseload of Chief Judge Casper Platt, since most of said cases [fol. 112] are pending in East St. Louis, Illinois before Judge Juergens. Thus, with regard to the cases pending before Chief Judge Casper Platt, as of February 28, 1962, there were 92 civil cases (see Exhibit E attached

hereto) and 2 criminal cases pending, for a total of 94 cases.

3. Comparing the caseload of 94 cases for Judge Platt with the average caseload of 170 for each judge for the District of Minnesota, it is clear that the Minnesota caseload is almost double that of the Danville, Illinois Court.

.....

HOWARD L. FINK

Subscribed and sworn to before me
this 31st day of March 1962.

.....

Notary Public
My commission expires March 22, 1965.

[fol. 113]

EXHIBIT A TO AFFIDAVIT OF HOWARD L. FINK

(Revised) "Ex. A" 1/2/3/6 Divisions

LRT

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

MONTHLY STATISTICAL REPORT OF CLERKS OF UNITED STATES DISTRICT COURTS CIVIL CASES (except bankruptcy)

District of Minnesota Month February, 1962

1.	Cases pending at close of preceding month		189
2.	Cases filed during this month:		
	a. United States cases	12	
	b. Private cases	13	
	Total filed		25
3.	Cases terminated during this month:		
	a. United States cases	12	
	b. Private cases	3	
	c. Aditional J. S. 6 cards in multiple party cases (See Instructions, page 24. J. S. 6-C)	0	
	Total terminated (a. and b. only)		15
4.	Cases pending at close of this month		199
5.	Number of within-district transfers listed on reverse side of this sheet		1

INSTRUCTIONS

Entries in Item 1 of this report must agree with entries in Item 4 of the report for the preceding month.

Item 2 must equal the number of J. S. 5 forms and Item 3 must equal the number of J. S. 6 forms (excluding those listed under c.) accompanying this report.

Submit only one report covering all divisions within your district.

[fol. 114] This report is to be mailed to the Statistical Division, Administrative Office of the United States Courts, not later than the 5th of each month accompanied by all report forms J. S. 5 and J. S. 6.

EXHIBIT A

MONTHLY REPORT OF WITHIN-DISTRICT TRANSFERS

(Within-district transfers do not require additional J. S. 5s and 6s)

	Cases originally filed in:			Transferred to:			
	Office	Docket	Docket No.	Office	Docket	Docket No.	Date
1.	5	1	62-9	4	1	62-48	2-6-62
2.							
3.							
4.							
5.							
6.							
7.							
8.							
9.							
10.							

If the sequence of docket numbers of cases filed is broken for any reason except because of a within-district transfer (listed above) please list the docket number omitted and the reason therefore in the space below.

[fol. 115]

EXHIBIT B TO AFFIDAVIT OF HOWARD L. FINK

(Revised) "Ex. B"

LRT

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

MONTHLY STATISTICAL REPORT OF CLERKS OF UNITED STATES DISTRICT COURTS CIVIL CASES (except bankruptcy)

District of Minn. Fourth Div. Month February, 1962

1.	Cases pending at close of preceding month		256
2.	Cases filed during this month:		
	a. United States cases	17	
	b. Private cases	20	
	Total filed		37
3.	Cases terminated during this month:		
	a. United States cases	17	
	b. Private cases	8	
	c. Aditional J. S. 6 cards in multiple party cases (See Instructions, page 24, J. S. 6-C)	0	
	Total terminated (a. and b. only)		25
4.	Cases pending at close of this month		268
5.	Number of within-district transfers listed on reverse side of this sheet		1

INSTRUCTIONS

Entries in Item 1 of this report must agree with entries in Item 4 of the report for the preceding month.

Item 2 must equal the number of J. S. 5 forms and Item 3 must equal the number of J. S. 6 forms (excluding those listed under c.) accompanying this report.

Submit only one report covering all divisions within your district.

This report is to be mailed to the Statistical Division, Administrative Office of the United States Courts, not later than the 5th of each month accompanied by all report forms J. S. 5 and J. S. 6.

[fol. 116]

EXHIBIT C TO AFFIDAVIT OF HOWARD L. FINK

(Revised) "Ex. C" Duluth

LRT Fifth Division

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

MONTHLY STATISTICAL REPORT OF CLERKS OF UNITED STATES DISTRICT COURTS CIVIL CASES (except bankruptcy)

District of Minnesota Month of February, 1962

1.	Cases pending at close of preceding month		72
2.	Cases filed during this month:		
	a. United States cases	10	
	b. Private cases	5	
	Total filed		15
3.	Cases terminated during this month:		
	a. United States cases	0	
	b. Private cases	2	
	c. Aditional J. S. 6 cards in multiple party cases:		
	(See Instructions, page 24, J. S. 6-C)	0	
	Total terminated (a. and b. only)		2
4.	Cases pending at close of this month		85
5.	Number of within-district transfers listed on reverse side of this sheet		0

U. S. 42
Private-43

INSTRUCTIONS

Entries in Item 1 of this report must agree with entries in Item 4 of the report for the preceding month.

Item 2 must equal the number of J. S. 5 forms and Item 3 must equal the number of J. S. 6 forms (excluding those listed under c.) accompanying this report.

Submit only one report covering all divisions within your district.

This report is to be mailed to the Statistical Division, Administrative Office of the United States Courts, not later than the 5th of each month accompanied by all report forms J. S. 5 and J. S. 6.

[fol. 117]

EXHIBIT D TO AFFIDAVIT OF HOWARD L. FINK

(Revised) "Ex. D"

LRT

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

MONTHLY STATISTICAL REPORT OF CLERKS OF UNITED STATES DISTRICT COURTS CIVIL CASES (except bankruptcy)

District of Minnesota — Month February, 1962

1.	Cases pending at close of preceding month		517
2.	Cases filed during this month:		
	a. United States cases	38	
	b. Private cases	38	
	Total filed		76
3.	Cases terminated during this month:		
	a. United States cases	28	
	b. Private cases	13	
	c. Aditional J. S. 6 cards in multiple party cases		
	(See Instructions, page 24, J. S. 6-C)	0	
	Total terminated (a. and b. only)		41
4.	Cases pending at close of this month		552
5.	Number of within-district transfers listed on reverse side of this sheet		1

INSTRUCTIONS

Entries in Item 1 of this report must agree with entries in Item 4 of the report for the preceding month.

Item 2 must equal the number of J. S. 5 forms and Item 3 must equal the number of J. S. 6 forms (excluding those listed under c.) accompanying this report.

Submit only one report covering all divisions within your district.

This report is to be mailed to the Statistical Division, Administrative Office of the United States Courts, not later than the 5th of each month accompanied by all report forms J. S. 5 and J. S. 6.

[fol. 118]

EXHIBIT E TO AFFIDAVIT OF HOWARD L. FINK

EXHIBIT E

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

MONTHLY STATISTICAL REPORT OF CLERKS OF UNITED STATES DISTRICT COURTS CIVIL CASES (except bankruptcy)

District Eastern Illinois (Danville) Month February, 1962

1.	Cases pending at close of preceding month		91
2.	Cases filed during this month:		
	a. United States cases	1	
	b. Private cases	6	
	Total filed		7
3.	Cases terminated during this month:		
	a. United States cases	2	
	b. Private cases	4	
	c. Aditional J. S. 6 cards in multiple party cases (See Instructions, page 24, J. S. 6-C)		
	Total terminated (a. and b. only)		6
4.	Cases pending at close of this month		92
5.	Number of within-district transfers listed on reverse side of this sheet		17

INSTRUCTIONS

Entries in Item 1 of this report must agree with entries in Item 4 of the report for the preceding month.

Item 2 must equal the number of J. S. 5 forms and Item 3 must equal the number of J. S. 6 forms (excluding those listed under c.) accompanying this report.

Submit only one report covering all divisions within your district.

This report is to be mailed to the Statistical Division, Administrative Office of the United States Courts, not later than the 5th of each month accompanied by all report forms J. S. 5 and J. S. 6.

[fol. 119]

EXHIBIT E

MONTHLY REPORT OF WITHIN-DISTRICT TRANSFERS

(Within-district transfers do not require additional J.S. 5s and 6s)

	Cases Originally Filed In:			Transfered To:			
	Office	Docket	Docket No.	Office	Docket	Docket No.	Date
1.	E. St. Louis	Civil	2700	Danville	Civil	1942-D	2/1/62
2.	"	"	2832	"	"	1943-D	"
3.	"	"	2845	"	"	1944-D	"
4.	"	"	2852	"	"	1945-D	"
5.	"	"	2856	"	"	1946-D	"
6.	"	"	2872	"	"	1947-D	"
7.	"	"	2873	"	"	1948-D	"
8.	"	"	2900	"	"	1949-D	"
9.	"	"	2944	"	"	1950-D	"
10.	"	"	3003	"	"	1951-D	"
	"	"	3008	"	"	1952-D	"
	"	"	3009	"	"	1953-D	"
	"	"	3012	"	"	1954-D	"
	"	"	3013	"	"	1955-D	"
	"	"	3033	"	"	1956-D	"
	"	"	4171	"	"	1957-D	"
	"	"	4967	"	"	1958-D	2/28/62

If the sequence of docket numbers of cases filed is broken for any reason except because of a within-district transfer (listed above) please list the docket number omitted and the reason therefore in the space below.

_____

_____

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_____

_____

_____

_____

[fol. 120]

* * * *

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ILLINOIS

Criminal No. 61-73-D

UNITED STATES OF AMERICA,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY,
DEFENDANT

TRANSCRIPT OF PROCEEDINGS, JUNE 14, 1962

Transcript of proceedings had in the above-entitled cause on the 14th day of June, A. D. 1962, in the District Court of the United States for the Eastern District of Illinois, at the United States Courthouse, in the City of Danville, Illinois, before the Honorable Casper Platt, United States District Judge.

APPEARANCES:

For the United States of America: Messrs. Earl A. Jinkinson, Raymond P. Hernacki, Theodore T. Peck, Leon L. Lindenbaum, Howard L. Fink, Attorneys, Department of Justice;

For the Defendant: Messrs. John T. Chadwell, Glenn W. McGee, Allen Reniche, John L. Connolly, Richard L. Post.

June 14, 1962

PROCEEDINGS

The Court: Good morning, gentlemen.
Mr. Chadwell: Good morning, your Honor.
The Court: Are you ready to proceed?
Mr. Jinkinson: Yes, your Honor.
The Court: All right.

[fol. 121]

ARGUMENT BY MR. CHADWELL ON BEHALF OF DEFENDANT

Mr. Chadwell: If agreeable to your Honor, I would like to proceed by presenting our motion to transfer under Rule 21-B, as the first matter to be argued before your Honor.

The Court: That is satisfactory.

Mr. Chadwell: I think, your Honor, I probably should express some indication of apology for the big stack of papers we have given you on this motion. I know it is pretty formidable.

The Court: Which proved to be good reading when I didn't have anything else to do.

Mr. Chadwell: I am sure—

The Court: And I had some time that I could do it.

Mr. Chadwell: I am sure that it would only be under the circumstances that you indicated.

Well, as your Honor knows, we have filed a number of affidavits in support of this motion to transfer, and have supported the motion by a brief to which Mr. Jinkinson has filed an answering brief and a supplemental, or an answering affidavit or affidavits, and we have filed a reply brief.

I would like to start by stating to the Court that the only issue I believe involved in our motion to transfer under Rule 21-B is whether it is in the interest of justice for the transfer to be made. It is admitted by the Government that the offenses—alleged offenses set forth in the indictment were committed in the District of Minnesota, as well as in the Eastern District of Illinois.

The Court: I don't believe—pardon me, Mr. Chadwell, I don't believe that is in the record.

Mr. Chadwell: But that is true, Mr. Jinkinson.

Mr. Jinkinson: Oh yes, your Honor. It is in our brief in a foot-note in the brief.

The Court: All right.

Mr. Chadwell: Yes. There is no doubt about it, your [fol. 122] Honor. The motion which we have made, we submit to the Court, comes directly within the provisions of Rule 21-B, as interpreted and in accordance with the

policy thereunder, as laid down by the United States Supreme Court and as undeviatingly followed in criminal cases in the district courts, and in the only case which has yet been decided in the Court of Appeals involving this question in a criminal case, in that one Circuit Court of Appeals case to which I shall refer.

Our motion to transfer in the interest of justice under Rule 21-B, is based primarily upon the admitted facts. The — not only undenied facts but the conceded facts that the home office of this defendant is in St. Paul, Minnesota. Its plant and a number of plants are in St. Paul, Minnesota. Its principal place of business, its research laboratories are in St. Paul, Minnesota. It has a number of plants and branch sales offices elsewhere in the United States, but it has no office or plant or branch in the Eastern District of Illinois.

There are something like twenty officers and directors of the company having general knowledge or specific knowledge about various phases of this case. All of them except one lives in St. Paul, Minnesota, or in the environs of St. Paul, Minnesota. During the course of the grand jury proceeding the Government subpoenaed, I believe it was ten executives of the Defendant. All of them lived in St. Paul, or the invirons of St. Paul, with the exception of one who is retired and who lives in California. Every probable witness that will be used by the Defendant in this case, from the Defendant company, resides in or near St. Paul. The disruption of the Defendant's business and the expense and inconvenience to the Defendant and employees and business operations of the Defendant would be so much greater if the trial were held in Danville, than in St. Paul, so serious to the company, the prejudice to the [fol. 123] company, both in defending the case and in the disruption of the business that would result from a trial in Danville, as compared to a trial in St. Paul. In the view of the company and in our view it is so great that we are impelled to press this motion on your Honor. As a matter of fact, the location of the vast majority of the probable witnesses on both sides makes St. Paul, rather than Danville, the most convenient, accessible situs for the trial.

Now, if your Honor please we—I wish to call to the Court's attention at the outset a basic rule which has been applied without exception, may it please your Honor, without exception so far as we can find in a case of this kind is that as stated succinctly, I think by Judge Cashin, in United States against Olen, which we have cited in our brief, the decision of Cashin in the Southern District of New York, in 1960, on a motion to transfer a criminal case. The citation of the case is one 183 Federal Supplement 212, and I'm reading a very brief statement at Page 217, where Judge Cashin said:

> "The Supreme has clearly taught, therefore, that any criminal statute should be construed, if possible, so as to lay the venue of a case in the home area of a defendant, at least so long as that home area has no [sic] [any] connection with the wrong charged."

That transfer order entered by Judge Cashin in that case was appealed from by the Government through a mandamus proceeding to the Court of Appeals of the Second Circuit of the Court of Appeals, the Second Circuit, in United States versus Cashin, 281 Federal 2nd, 669, sustained the transfer order entered by the Court and in so doing said:

> "Recognizing the 'unfairness and hardship to which trial in an environment alien to the accused exposes him,' and the important policies underlying the venue provisions of the Constitution and Bill of Rights, the [fol. 124] Supreme Court has declared that the venue statute should, whenever possible, be construed so as permit trial at the residence of the defendant."

Now, the reason for that rule is stated quite clearly, I think, by the Supreme Court in two cases, primarily two cases. One is the case of Hyde versus Shine, in 199 U.S. 62, which was an indictment brought in 1905, long before Rule 21-B was adopted, and in that case where a defendant had been indicted in the District of Columbia, whereas he lived in San Francisco, the court held that the venue provisions of the statute impelled a trial in the District of Columbia where the indictment was brought, and there

was no power to do anything about it at that time, but the Court went on to say there, and this decision in the Hyde case I think is what—that, plus later Supreme Court decisions, in the situation which arose, as a result of non-residence indictments, impelled Congress to—or the Supreme Court to approve Rule 21-B, in 1947, and in the Hyde case the Supreme Court said that, in spite of the fact that they upheld the venue there:

> "But we do not wish to be understood as approving the practice of indicting citizens of distant states in the courts in this district, where the indictment will lie in the state of the domicile of such person, unless in exceptional cases, where the circumstances seem to demand that this course shall be taken. To require [a] citizen to take a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship, to which he ought not to be subjected if the case can be tried in a court of his own jurisdiction."

Now that policy stated by the Court in that case was restated by the Supreme Court in the Johnson case, by [fol. 125] Judge Frankfurter, who wrote the opinion for the Court, in 323 U. S. 273. There the Court, again in a criminal case, took occasion to comment upon the situation which existed at that time. This was in 1944, when Justice Frankfurter wrote the opinion in the Johnson case. He took occasion to comment upon the situation which existed at that time which resulted in Rule 21-B, and that situation was, if your Honor please, as your Honor knows, that in certain classes of criminal statutes such as conspiracy statutes, anti-trust statutes, where a company is involved in national operations, such as mail fraud cases, where a proper situs could be almost anywhere, there is no doubt that proper venue would lie in almost any jurisdiction in the country. And as a result very frequently the Government, for reasons which I do not criticize, but for reasons having nothing to do with convenience of the trial, so far as the defendant is concerned, would see fit to indict wherever they thought it was convenient for the

Government. Now that practice was criticized over and over again, and the Supreme Court in the Johnson case said that:

> "By utilizing the doctrine of a continuing offense Congress may, to be sure, provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates."

Then the Court said:

> "Thus, an illegal use of the mails or of other instruments of commerce may subject the user to prosecution in the district where he sent the goods, or in the district of their arrival, or in any intervening district. Plainly enough, such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed [fol. 126] a tribunal favorable to the prosecution. These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests."

Well, in that case which as I said was decided shortly before the Rule 21-B was adopted, the Court made that statement to which I have called your Honor's attention, as the Court had in the Hyde case, and the result was that 21-B was adopted which provides as I have indicated, and as your Honor knows, where a crime admittedly, or an alleged crime admittedly is committed in several districts, the place where it is brought is not conclusive, and the Court in that jurisdiction, according to the rule, shall transfer to the more convenient jurisdiction if he finds that it is in the interest of justice to do so.

Now the rule that I have referred to a moment ago, the policy that I referred to a moment ago, of transferring to the home district of the defendant where possible, is an extension of the general policy laid down by the Supreme Court in these pre-rule 21-B cases which has been followed without exception in several anti-trust cases that we have been able to find. And the reason for it is made

clear, it seems to me, by what Judge Yankwich said in the National City Lines case. That was a case decided by Judge Yankwich in California in 1947, United States against National City Lines, 7 Federal Rules Decisions 393, which has been, if your Honor please, regarded by the Courts as a landmark decision in this field. It was the first criminal case decided after the adoption of Rule 21-B. And Judge Yankwich in that case, reviewed the reasons for the adoption of the rule which I have attempted to state briefly to the Court this morning, and quotes from statements made by Judge Medalie, who was on the committee, I believe chairman of the committee appointed by the Supreme Court, which drafted the rules of criminal [fol. 127] procedure in which 21-B was incorporated, and Judge Medalie strongly criticized that which he called the shabby business that had been pursued prior to that time of indicting defendants corporate and individual away from their home base, away from the principal place of business to the great disruption, inconvenience, and expense of the defendant in a criminal case.

Now I'm not going to take time to read extensively from National City Lines case. It is a somewhat extensive opinion. I might say that to my surprise that opinion, which has been followed over and over again by district courts and by the Court of Appeals, in the Cashin case, to which I referred, has been criticized by the Government in the brief which they filed here upon the rather surprising, to me—the surprising ground, in a foot-note on Page 10 of their brief, that Judge Yankwich decided the way he decided because he was anxious to get rid of the case. Well anyone who knows Judge Yankwich knows that there is no more industrious or energetic judge, and I think it ill becomes the Government to seek to discredit the decision of one of the federal judges upon such a ground as that. The fact of the matter is that it is a well reasoned decision and it has been followed by other judges time and again, and as late as just a few months ago, and I'm going to refer to some of the other decisions and the rules which he laid down, merely followed the policy of the United States Supreme Court to which I referred at the outset of my remarks, namely, that a basic principal

[sic] [principle] is that one of these cases, criminal cases which could be filed in one of several districts, should be transferred to the home jurisdiction of the defendant where it is possible to do so, and unless there is a compelling reason to the contrary.

The Court of Appeals in the Cashin case reaffirmed it. And I think it must be considered as settled—the settled law of the land.

[fol. 128] Now I would like to review, if your Honor please, I would like to review the facts in this case which I think emphasized the importance of applying that settled law of the land to this case. And what are those facts?

As I said at the outset, there is not a single plant, office, or facility of any kind owned by the defendant in this jurisdiction. They are all, so far as pertains to this case, they are all located in St. Paul. There are no directors, officers, or employees who have anything to do with this case located here. There may be a salesman or two who lives here, I don't know about, but certainly there is no officer, director, or executive who would be called to testify in this case who reside here. Now this case is an exceedingly complex one. I have been in a number of antitrust cases and some complex ones with Mr. Jinkinson and other Government lawyers, not as competent as he, but competent. And I say that sincerely because he is a tough opponent, and this case, may it please your Honor, in my experience bids fair to be the most complicated case that I was ever in, and I want to explain the reason for that to the Court.

Here is a case in which three basic products of this company, basic divisions of this company are concerned, pressure-sensitive tape, which has been the backbone of this company's operation for many, many years, and falls into a number of different categories. That is one product that is covered by three of the nine counts in the indictment. The second product is magnetic tape, covering three counts, and the third product is lithographic plates.

Now the Government has retained from the files of this company, in its search of these files, which has extended since 1945, it has retained some fifteen thousand documents. The indictment covers a period of thirty years.

These documents, a great many of them, go back into the early thirties, the activities of this company during that [fol. 129] year in this basic product of pressure-sensitive tape, the activities of this company in that important product, the back-bone of its business. Those activities are called into question for that whole period in this case. In addition to that, the Government is challenging, as it is clear from the affidavit of Mr. Jinkinson, the Government is challenging some thirty-five or more patent infringement suits in which this company has participated as a plaintiff or as a defendant in certain declaratory judgment cases for the last twenty years or more. These cases are complex ones. The Government is challenging the good faith of this company in these cases. In order to defend them, it is necessary to say why we did what we did in each of these thirty-five cases or more which the Government is challenging. As your Honor well knows from your long experience in litigation what it means to get into the facts of these cases which they are challenging and bring out the defense that we've got to show our good faith throughout this period.

Now I'm not arguing the merits of this case, as your Honor will realize. I am merely saying what I am saying to show the complexity of the thing and the large and important and extensive issues that are involved vital to the business of this company. Well now what does that mean? It means that if we try this case in Danville, we have the impossible task of transporting down here the voluminous records of the company that might be appropriate in the defense of this case. It is very difficult to predict in advance exactly what they are. There are hundreds of file drawers of these records in St. Paul, and they are all located there, and there are none of them located any place else. We would not only have to do that, but as your Honor knows, in a complicated case of this kind, it is essential for counsel for the defendant to have access not only to the files and records promptly as matters come up, but it is necessary for counsel to be able [fol. 130] to confer with executives and employees of the company with knowledge of the facts.

Now, as has been stated by the courts, a number of courts under these circumstances, that situation is a basic

reason for the application of Rule 21-B to transfer the case to the home office of the corporation to avoid the inevitable disruption of the business of the corporation that would ensue from bringing the necessary files and executives into another jurisdiction to defend a criminal case. Now on that, if your Honor please, I would like to call your Honor's attention to several cases which have been decided on that precise point, criminal cases now which have been decided on that precise point in the last two or three years. Now one of them, United States against American Natural Gas, decided by Judge Tehan, in 1959, the case in which I happened to appear as counsel. The indictment, an antitrust indictment, was returned at Milwaukee. Now in that case there were three defendants, three major defendants, groups of defendants. I represented one of them, Peoples Gas, which is the Chicago Gas Company, that was indicted, and we moved to transfer that case to Chicago, and one ground for the motion, the principal ground for the motion, was what I have just been arguing to your Honor, which was true of the Peoples Gas Company, as well as of Minnesota Mining in this case.

And Judge Tehan said, in transferring that case to Chicago, the home office of Peoples Gas, that no one who has had experience in protracted litigation involving important stakes such as are involved here can be at all realistic and not recognize the need and value of close contact between clients, officers of corporations, their records and attorneys immediately prior to and during the course of the trial, and that the contact could be best maintained by most of the parties if trial were held in the Northern District of Illinois.

And there, if your Honor please, we did not have as [fol. 131] clear a case as we have here because there were three defendants. There was Peoples Gas, in Chicago. We filed a motion to transfer which was joined in by the other defendants. It was American Natural of Ohio, and American Natural of Detroit. American Natural had extensive operations in Chicago, files in Chicago, because their counsel were there.

Now Judge Tehan transferred that criminal case to Chicago, and we made the same argument that I am mak-

ing to your Honor, and that argument is the serious disruption of the business of these companies, not only in these areas which are involved in this lawsuit, but in other—all other areas of the business, if the case is not tried in St. Paul, and let me explain that by way of digression for just a second. The affidavits in this case of the executive vice-presidents who have to do or have immediate charge, direct charge of these three products show that they are in charge not only of one of these divisions involved in this case but of other divisions not involved in this case. They have subordinates likewise who have to do with the division involved in this case and who have to do with the division involved in these and other divisions. There is no way of determining what men should be here or who should not be here, what records should be, or what shouldn't be. If a trial is held in St. Paul, we have ready access to the files. We have ready access to all employees of the company. They are all right there, and if not busy with us they can be back working, and they can be carrying on the normal affairs of the corporation. They can come down to the courtroom in fifteen minutes when we need them. If the trial is in Danville, your Honor can see, we've got to choose between leaving them up there in a jury case, and take a chance on bringing them down, or we can guess what we will need, and have company employees going back and forth. This is all quite aside from the expenses, to the [fol. 132] impossibility of fairly and adequately defending these people when the trial is far from the business of the company. Now here, where you've got a single defendant, Minnesota Mining, there can't be any doubt about it, and I respectfully submit to the Court, can't be any doubt about the applicability of this policy which I have stated to the Court. That was recognized, that rule was recognized, and that fact was recognized by Judge Tehan in the American Gas case. I call your Honor's attention to a more recent case and that is the General Motors Electromotive Case decided by Judge Sugarman, in New York. That case is United States against General Motors, 194 Federal Supplement 754, decided in 1961. In that case the sole defendant was General Motors

Corporation, just as Minnesota Mining is the sole defendant here. The indictment was returned in New York. The place of business of the Electromotive Division of General Motors was in Chicago. Their records were there, their executives were there. The case was a complicated one, and although there were some witnesses who lived in New York, that the Government could have called, the Court held, in balance, when you consider the unfairness to the defendant of requiring it to bring its witnesses and its records to New York, the impossibility during the course of the trial of properly preparing and continuing the trial with these people far away, unless the business is so disrupted as to bring all of them who might be necessary to New York, along with their relevant records, that the case ought to be transferred. And the case was transferred to Chicago, and the court recognized the same undeniable fact, recognized by Judge Tehan in the American Gas case, and said:

> "The testimony of the principal executives and other officials of the Electromotive Division will be required. All of them reside and have their offices in the Chicago area. The Division's normal business [fol. 133] operations cannot be carried if these key men were absent from the Chicago area during the trial; the case cannot be properly presented with [sic] [without] the expert knowledge and advice of these men being made available to counsel throughout the trial."

There just can't be any question about that and the court, Judge Sugarman, in the General Motors case, in 1961 so held.

I also refer the Court to the White case, United States against White, decided in 1951, in 95 Federal Supplement 544, where the Court held that the same considerations applied. The case was transferred to the home base of the defendant where the indictment was returned elsewhere, United States against White, and the Court issued the transfer order. The Court said that:

> "To be ready for, and participate in, his trial in Nebraska he would have to bring his attorney to

North Platte. He would also necessarily bring for that considerable distance many records or copies thereof and numerous witnesses, not all of which or whom may prove to be necessary, but the anticipatory elimination of any of which or whom would be rash and imprudent. Such action would involve him in vastly greater expense than he would incur in a trial in Oklahoma, to which the unpalatable alternative—and that only partial—would be the dangerous exposure of his liberty that would be involved in leaving much of his documentary evidence and many of his witnesses beyond reach at the time of trial upon the dubious assumption and hope that they might not be needed."

And it is clear from the General Motors case and from what Judge Yankwich said in the National City Lines case that these considerations apply, as Judge Yankwich said, whether the defendant be poor or rich, whether he [fol. 134] be a small or a large corporation, the same reasons for the ruly apply, and the same reasons for the transfer apply. Now I might, while I am mentioning the White case, I might take this—I want to make two observations on it. The first one is this, Your Honor. We have searched the records and authorities, and carefully and thorougly I believe. We have not found a single case, not one, and I do not believe there is a single case where a criminal indictment was returned in a place other than the home office of the defendant and a motion to transfer has been refused to the home office of the defendant, not a single case, not one.

Mr. Jinkinson does not cite one, and I don't believe there is one. There may be cases, and there are some cases where there are several defendants and one defendant will move to transfer to his home office, and some of the other defendants will oppose the transfer, or join in the transfer, or the Court could not see a reason why one home office should be picked out, but we have not found a single case such as this where there is a single corporation involved where a court has denied a transfer, in a criminal case. Now Mr. Jinkinson has cited a number of civil cases. He is not citing criminal cases be-

cause criminal cases don't help him, and he hasn't found any that help him, and he lets us cite the criminal cases. Now the fact of the matter is I think the civil cases likewise support our position, but there is this very important point which your Honor will recognize in a criminal case, that the scope of the trial in a civil case can and the length of the trial can be very closely restricted and limited by pre-trial discovery. Now the Court, through pre-trial and the parties through the tools of discovery, can get many issues out of the way to simplify the matters greatly. It can end up in a much shorter trial as a result of pre-trial discovery than would be the case if there were no pre-trial discovery. Now in criminal cases [fol. 135] we don't have anywhere near the same scope of pre-trial discovery that we have in civil cases. Hence, it is necessary for the defendants in criminal cases to have at their disposal, and as Judge Tehan, and Judge Sugarman said, immediate access to and the ability to confer with executives, employees who have knowledge of any of the facts that may come up in these complex antitrust cases.

It is not only a question, if your Honor please, as to the unfairness to the defendant of transferring this case or not transferring this case, but we have several other important reasons in support of our position. One is the location of the events in issue. Where did they take place. Now, as I said to the Court, the basic question here is one of involving Minnesota Mining activities with respect to patents, patent licenses, and patent infringement suits. So far as we know and have been able to ascertain, and it is supported and not denied in the affidavits which we have filed, the conferences, the discussions, the decisions made by Minnesota Mining involving this very complicated patent area were either in—were in St. Paul or in some instances these discussions were in other sections of the country more accessible to St. Paul than to Danville, but in no cases were in Danville. The—or in the Eastern District of Illinois. There is no major competitor of Minnesota Mining in pressure sensitive tape or in plates, two of the three products involved in the case in the Eastern District of Illinois. The so-called conspirators

who are named in the indictment who had—all of whom or many of whom had witnesses here before the grand jury, and many of whom will testify either for the Government or for the Defendant in this case, none of this [sic] [these] co-conspirators are from the Eastern District of Illinois; they are in areas that are more accessible to St. Paul than to Danville. Of the thirty-five patent [fol. 136] suits, thirty-eight, whatever it was, which were —which are challenged by the Government as being suits not filed in good faith, only one was in the Eastern District of Illinois, and that was not a suit filed by Minnesota Mining, but was a suit filed by the owner of the patent, and the Government seized upon that case filed in this District as a basis for jurisdiction here. That is the Williams case which was tried before Judge Juergens several years ago. Well now, in the first place, I'm assuming for the purposes of this motion that the Juergens case means that venue is properly laid here. At least as to the three counts which involved that product in that case, namely the magnetic tape. That suit involved magnetic tape. It didn't involve any of the other two products, so it has no bearing whatsoever on venue in the other six counts, but I am willing of course to assume for purposes of this motion that that does give this Court venue on those three counts, but the question on a transfer motion is, if your Honor please, is not whether the local court where the indictment is returned has jurisdiction, whether venue was properly laid. The basis of Rule 21-B is the assumption that venue was properly laid in the jurisdiction where the suit was filed. Mr. Jinkinson's argument amounts to ignoring Rule 21-B and basing— and assuming that if they are able to show venue in the Eastern District of Illinois, that ends the argument. Well it doesn't end the argument. Assuming that venue is properly laid in the Eastern District of Illinois, then is when Rule 21-B comes into play and only then does Rule 21-B come into play and the rule says, and the courts who have passed upon the motion to transfer under that rule hold that the question is not whether the court where the indictment—in the jurisdiction where the indictment is returned has venue. The question is in the

interest of justice should the case nevertheless be transferred to the—to a more convenient district, and as I said, as I argued to the Court and strongly urge to the Court [fol. 137] every single case which I have referred to where the Court has transferred a case to the home district of the defendant, and they have never done anything else in the case of a single defendant, in every one of those cases, there was no question but what the district where the suit was filed had jurisdiction. There was no question but venue was properly laid, but transfer was made in spite of that fact, and under Rule 21-B for the reasons that the courts have stated and which reasons I urge to the Court are here in full measure.

Now the—we have shown a list of numbers of witnesses which the Government will probably call on the basis of information we have, not their names, but where they are located. As we can glean the facts of the indictment itself, it charges with respect to co-conspirators—well from indications which the Government has made, they have been quite secretive about furnishing any information in this motion as to their list of witnesses. Mr. Jinkinson has indicated that he might possibly divulge some of that information at the oral argument. We haven't been given the information yet. I say to the Court that the question whether it would be convenient to the Government or not—to transfer this case—to leave this case in the Eastern District, assuming they have got some venue witnesses here, is no answer at all because the Government always has venue witnesses in areas where the suit is filed, and that fact cannot overbalance the overwhelming reason for the transfer based upon this policy of transferring to the home base of the defendants. And there is no showing of any fact in the Government's affidavit as to these witnesses that can overbalance that strong and in our view irrefutable showing.

Now the Government has—we have made reference to the relative condition of the docket in the East St. Louis and in the Eastern District and the District of Minnesota. The fact is the differences are inconsequential. [fol. 138] The dockets in both districts are current, and while it is true of course that the condition of the dockets

of the two districts is of—is one of the factors for a court to consider where a trial can be—whether one would permit a speedy trial and whether the other one would result in a long delay—as I say, that is a factor to be considered, yet the courts have held, and I refer to the decision in the General Motors case, this one I am about to refer to I guess, in a civil case, the only one I believe that I have cited to the Court, where the Court said that though the Court may consider the condition of the docket in the two districts, it is never a factor to which great weight is assigned.

That was Physer against General Motors, 158 Fed. Supp. 526.

I say that the condition of the dockets in the two areas are substantially current and the difference in trial date can make no substantial difference to either side, and it is not a point that means anything in this case under those circumstances as was said by the Court in the Erie Basin which we have cited to your Honor, that is 79 Fed. Suppl. 880, Judge Coleman's decision in Baltimore —the question is not only one of where the—a speedy trial can be held, but where a fair trial can be held, and I know that the Court recognizes on the basis of my remarks which are—that a fair trial to the defendant can be held in St. Paul, which would—

The Court: How many stockholders does Minnesota Mining have in St. Paul?

Mr. Chadwell: Stockholders? It is a listed stock.

The Court: Pardon?

Mr. Chadwell: It is a listed stock, so they have a great many stockholders.

The Court: I know they do, but are a great many of them located around St. Paul and Minneapolis?

Mr. Chadwell: Yes there are.

[fol. 139] The Court: Of course, there are employees there and executives there as you say.

Mr. Chadwell: Yes.

The Court: But the biggest part of their operations are there?

Mr. Chadwell: Yes. And that is where our witnesses would come from and our help would come from.

The Court: That is where the biggest part of your employees would be. What I am referring to is obtaining a jury up there, an impartial jury. St. Paul isn't a very large city, two hundred fifty or three hundred thousand?

Mr. Chadwell: It is a large community I think in that neighborhood. Of course, the jury comes from the whole district.

The Court: That is true.

Mr. Chadwell: And the district includes—

The Court: I expect there must be over a million people in Minneapolis-St. Paul.

Mr. Chadwell: There are over one milion people in Minneapolis and St. Paul. I belive that is correct, and of course the district covers the entire state, as your Honor knows. I can't answer the question as to the number of stockholders of Minnesota Mining in Minnesota. We can get that information for the Court if you desire it. I can very easily do it and will, if your Honor wants it. But, I see your Honor's point, of course, but I can't believe that there would be any problem there, because any stockholder on the panel could be challenged for cause if the Government wished to do it.

The Court: That is true.

Mr. Chadwell: And there are plenty of others who are non-stockholders I am sure.

The Court: But there are fellow sympathizers with Minnesota, no doubt there too.

Mr. Chadwell: Your Honor, with all respect—

[fol. 140] The Court: Of course I will admit in a population of that size—I don't know how many stockholders you have there. I haven't the least idea.

Mr. Chadwell: As I say, for the Court I can get that.

The Court: How many employees do you have there? I don't know that.

Mr. Chadwell: If your Honor wants it, I can get that information for the Court. I certainly can.

The Court: I think the Government is entitled to know that, and the Court is entitled to know that here.

Mr. Chadwell: Yes sir. We will get that information for the Court, and I see your Honor's point, of course. I can't conceive of a community of that size of the impossibility of getting a fair jury.

The Court: They have been located there for a good many years, haven't they?

Mr. Chadwell: Yes they have. Of course they were a small company for a number of years, very small when Mr. McKnight went with them in 1907. It was a very very small concern. It has grown through the years. I can't believe, if your Honor please, that that could be a factor in a community of that size, and if that were so it would be—it would have been an answer to the transfer, I suppose, of all these cases, of People's Gas, for example, is a Chicago company listed on the New York Stock Exchange.

The Court: Well, coming into Cook County of course the population is greater by three or four times.

Mr. Chadwell: Well yes.

The Court: Maybe more.

Mr. Chadwell: But comparing it with the number of stockholders.

The Court: That may be. I don't know about that.

Mr. Chadwell: We will get that information for the Court.

The Court: Comparing stockholders, I don't know. [fol. 141] Maybe every Tom, Dick and Harry own stock in Minnesota Mining, I don't know.

Mr. Chadwell: Well I don't either. We will find that out and give it to the Court.

The Court: I know when you have a plant—similar to the Minnesota Mining up around there, every Tom, Dick and Harry would have a share or two, or at least they would try to get them to buy a share, in the old days. I think that is a factor here.

Mr. Chadwell: All right, sir. We will get that information for the Court. So far as I know that factor has not been discussed in any of these cases, so far as I know. I don't believe it has.

The Court: No doubt the officers and directors have been very active in various civic organizations up there and in that way they have built up a favorable attitude toward the corporation, and it might have an effect upon a jury.

Mr. Chadwell: Well, your Honor—

The Court: I don't know. I think those are things that ought to be considered.

Mr. Chadwell: I think that is one of the vagaries of the jury system.

The Court: Well—

Mr. Chadwell: It can always be said, I suppose, that that could—that a jury could be in some way influenced by those facts. I don't know here. It may be people up in St. Paul do not like Minnesota Mining Company. They have been pretty successful. As a matter of fact, I have found more often than not that the more successful a company is the more enemies it makes.

The Court: That may be.

Mr. Chadwell: I doubt if the mere fact that it is a large company and has a number of stockholders and employees in the area, I doubt if that fact would mean that [fol. 142] everybody in the area is prejudiced in favor of Minnesota Mining. I imagine they have stepped on a good many toes in the normal process of going along with their regular business. But we will get that information for you.

The Court: Very well.

Mr. Chadwell: Now I call the Court's attention—in addition, I won't read from it, but I call the Court's attention to a decision of Judge Matthews in March of this year, in the Van Line, North American Van Line case. I believe we sent that to the Court after the briefs were filed, in which Judge Matthews followed the—or quoted from or referred to the National City Lines decision and transferred the United Allied Van case which had been filed in the District of Columbia down to Indianapolis. That was a criminal case. Now that was done, if your Honor please, that was done although it was not the only defendant. There were other defendants there too. It was the principal defendant, but it was the principal defendant and for that reason the Court transferred it there and followed in general, I would say, the approach taken in the General Motors case, in the National City Lines case, in the American Natural Gas case, the theory of trying it at the home district, which I have tried to expound to the Court.

I want to come to one final point in closing, and I apologize for taking much longer than I would, that is the reference made and the great emphasis placed by Mr. Jinkinson on the decision of Judge Caffrey, of Boston, in the Plymouth Rubber declaratory judgment suit filed against Minnesota Mining, that decision having been handed down a month or so ago. I don't think that decision of Mr. Jinkinson's argument based upon it have any proper place in this argument. In the first place Judge—Mr. Jinkinson is arguing on the basis of what Judge Caffrey said in that opinion and otherwise that Minnesota Mining is in a fine position to come into court [fol. 143] and ask for a transfer of the case from Danville to St. Paul on the ground of inconvenience because Minnesota Mining in all this patent litigation which they have filed, or some of it, has been an inveterate forum shopper, as he says, themselves, and they've got no business taking advantage of Rule 21-B. Well now, if the Court please, one of the important issues in this case is whether this type of litigation was in good faith or whether it wasn't in good faith, and that is an issue that can't be tried out on this motion. The defendant in this case is entitled to the presumption of innocence of the charges alleged in this indictment until and unless there is a guilty verdict in this case, and they're entitled to that presumption of innocence throughout this motion and the presentment and the decision on this motion, just as they are entitled to that presumption at the trial. It is a presumption which Mr. Jinkinson completely ignores, which he completely flouts and assumes the defendant's guilty, and says the defendants, this defendant has been guilty of forum shopping, of filing suits in bad faith. He is not entitled to Rule 21-B. It is an absurd argument. I say this decision of Judge Caffrey which he held against the company, but it hasn't been followed by other courts, some other courts—not all. The fact of the matter is the first suit that was filed by Minnesota Mining on this one patent that was involved in the decision of Judge Caffrey, the first case that was filed they won it. The patent was held valid and infringed by Plymouth Rubber Company. That decision was reversed, it is true. On the issue of

infringement and validity, Judge Robson at Chicago, only a month or so ago upheld the validity of that very patent and infringement and held there was infringement, just a month or so ago. It is true he said that. That case will be appealed, the decision will be. Judge Caffrey's decision may or may not stand up. I don't know, I do say [fol. 144] we are entitled to the presumption of innocence, as I say, defendant is in every case, until proved guilty. If Mr. Jinkinson's arguments were sound there will never be a case transfered, because it could always be said these defendants are guilty, let's get on with the trial. Let's get in and try it, we'll cut out all the things we say are bad. Well, there is never going to be a transfer. I say the argument is absurd and flys in the face of a basic American principle of the presumption of innocence in these cases. I am sure your Honor agrees with that. I do not have to labor the point. I might say a similar argument, somewhat similar argument was made to the Court in The United States against White, 95 Fed. Suppl. 544, and then—and I call the Court's attention particularly to Pages 548 and 551, and the Courts made this observation, which I think is quite pertinent to this surprising argument that is being made here, and I am quoting from the Court's opinion granting transfer.

> "Despite the suspicion of his guilt which may issue from his [the defendant's] prosecution, he is protected by the presumption of innocence, rationally understood. A trial judge is at great pains to emphasize that presumption in his charge to a jury in the trial of a criminal case. He ought not altogether to neglect it himself, even in the preliminary phases of prosecution."

and I say the Government ought not to ignore and they have ignored it in making this argument, and I want to make a second point in connection with Mr. Jinkinson's arguments based on the Caffrey case, and it is this. As I understand it, he seeks to make the Caffrey decision applicable and pertinent here in some devious reasoning. If I understand it, it goes something like this, and I quote from Page 12 of his memorandum. This forum shopping

[fol. 145] defendant, they call us, primarily ignoring the presumption of innocence, is an expert in the conduct of protracted cases in distant forums. It is more than able to undertake the additional financial expense occasioned by being tried in Danville. The Government concedes—I call your Honor's attention to this—the Government concedes that Minnesota will suffer some additional expense and inconvenience by standing trial here, but denies it amounts to—although at best the estimates may be somewhat high, but denies that it amounts to an injustice to hold the trial here.

Your Honor, let me just analyze that for a moment. The difference between—well first a very great many of these cases were in the home district of the defendant, and your Honor will know that under the patent laws it is necessary to sue in the home district of the defendant a/or place where he has a place of business and where the infringement took place. You've got those. Now, without trying to argue the merits, which obviously I cannot do at this time, there is quite a difference between the trying the issues of a single patent case in a foreign jurisdiction and trying the issues to prove good faith of thirty-eight patent cases involved in this litigation, plus all of the issues going back thirty years, concerning licensing and other activities attacked in this indictment for three different and important divisions of the business. And I say that the question here is that—is whether under the rules laid down by the Supreme Court and the other courts that I have referred to, whether under those rules it would be unjust to make this defendant go to trial here and stand not only expense which is substantial and worthy of serious consideration, the additional expense, not only that, and the additional expense as pointed out in the affidavit, Your Honor, not only that, but in addition to the greater expense that would be incurred in Danville, the important point is that we would not be able to have the ready access needed to executives, em-[fol. 146] ployees, and officers of this company that we would have, in Danville, or to the records that we would have in Danville, and it simply flys in the face of known procedure and practices in the trial of protracted cases

to say that a lawyer defending a company away from its home base would be able to do so fairly to the company with complex issues of this kind, would be able to do so far from the home base of the company as well as if it were at the home base of the company, and that, if your Honor pleaese, is the basic consideration of these cases that I have cited to the Court, and one that cannot be answered by a reference to a decision in a single patent case, the issues of which may or not have been correctly decided. That will be decided later on by the higher courts.

I have gone much longer than I should have, I know, and I respectively urge the Court upon the basis of the arguments which I have made to grant this motion of transfer, and I rely upon the arguments which I have made, upon the affidavits which we have filed, and the original and reply briefs which your Honor has. I thank you for your Honor's patience in listening to me during this lengthy argument.

The Court: All right, Mr. Jinkinson.

Mr. Jinkinson: Thank you, your Honor.

The Court: We will listen to you.

ARGUMENT BY MR. JINKINSON ON BEHALF OF UNITED STATES

Mr. Jinkinson: May it please the Court. I have listened to this with great interest, to Counsel's learned analysis of his position, and I think it again highlights the fact that whenever Mr. Chadwell and I get into an argument, I think it is safe to say we take extreme sides of the issue. I predict that some day, if we ever agree upon something some district judge will declare a half holiday in memory of the event.

Now, your Honor, Mr. Chadwell accused the Govern- [fol. 147] ment of [violating] its basic duty and responsibility [sic] [by] ignoring the presumption of innocence of the defendants. I think I am very conscious of the fact that in a criminal trial, at all times [I] know that the defendant is not going to be convicted until he is proved guilty beyond a reasonable doubt, and that that presumption goes with the defandants at every stage of the trial.

We do not say that or ignore the presumption of innocence because forum shopping is not a crime. I say this to your Honor in all sincerity—forum shopping is just a nasty business which makes the defendants' hands unclean when it asks for a transfer "in the interests of justice."

Your Honor, Mr. Chadwell's argument, if I follow it at all, would have this Court not exercise its discretion on a matter of these transfers, and this is a matter of discretion with the Court. If I were to believe and this Court were to believe Mr. Chadwell the criminal venue should be laid at all times at the residence of the corporation or defendant, and that I emphasize to the Court is not proper venue under the criminal laws. From all the emphasis which Mr. Chadwell places upon the expense and convenience of the defendants in his remarks this morning, and in the defendant's briefs, I am almost led to believe we are debating an interpretation of the statute relating to civil suits, 28 U. S. C. 1404 (a), which lists the convenience of the parties as one of the three key tests. But remembering the indictment, I realize it is the language of Criminal Rule 21-B which controls, so the resolution of this motion depends upon the interest of justice. Let me say parenthetically, the Court raised a very important question with reference to the stockholders in St. Paul, the employees in St. Paul, and I can assure the Court that before I complete my argument I am going to adequately answer the Court's question, and I am going to do it in such terms that I think this Court will be convinced that [fol. 148] the Government will not get a fair trial in St. Paul. Justice is not a one-way street down which the defendant travels alone. The Government is entitled to the same considerations as the defendant, and I think that I can prove out of the mouth of a witness, an executive of Three M's, that the Department of Justice, the Government will not get a fair and impartial trial in St. Paul. Now, what is the interest of justice on the motion to transfer the criminal case? The defendant has collected practically every point ever mentioned by a judge in granting a motion to transfer and urges that these are the, quote, factors, unquote, which this Court must apply in this case. Most of them, if not all of them relate to the convenience

of the defendant. But it is obvious that the framers of Rule 21-B did not wish to saddle the trial court with any cut and dried factors to which it was to confine itself in deciding whether to transfer. Instead, they set out a very broad test so that the Court would have a wide discretion to examine the special facts and circumstances of each situation and tailor its ruling to the needs of each case. Neither the defendants nor the Government can point to a case, a criminal case, that was ever reversed because a transfer motion was denied, or a defendant was convicted because a transfer motion was given.

For example, as we point out in our brief, in the case of an individual defendant who is in poor financial condition, it may result in an outright hardship to insist that he stand trial in a forum distant from his home. The defendant has cited some cases of this nature. Therefore, under the circumstances of such cases, the inconvenience to the defendant becomes so great that the interests of justice require the transfer. But I hasten to add such circumstances are not present at bar where we are dealing with a remarkably profitable corporate giant. There is no suggestion made that this defendant cannot afford [fol. 149] to defend itself against an anti-trust prosecution be it in Danville, Illinois or Juneau, Alaska.

Your Honor, the Olen case which counsel cites, involved defendants in financial straits, so I cannot agree with Mr. Chadwell that the motion in this case must be treated —tested by what is more convenient to Minnesota Mining. What then are the particular facts and circumstances relating to this case which should command your Honor's attention? Well one thing, this Court is concerned with the protection of the residents of the Eastern District of Illinois. When criminal conduct which is engaged in, which has a harmful effect upon a substantial number of the residents of this District, I think your Honor is required to take notice of it. Having caused such injury, the defendant should be required to stand trial for it in that same district, unless he can establish such compelling reasons for transfer that it would be unjust to deny it.

The Court: Aren't you assuming there that the defendant is guilty?

Mr. Jinkinson: No. Not at all.

The Court: Well you are saying that they have made this go to certain citizens in the State of Illinois, or this district.

Mr. Jinkinson: Your Honor, I probably should have said that the criminal conduct is engaged in and charged to have been engaged in.

As the Supreme Court says in the Hyde case:

> "It is not oppression in the law to accept the place where an unlawful purpose is attempted to be executed as the place for its punishment, and rather conspirators be taken from their homes than the victims and witnesses of the conspiracy be taken from theirs." That's 225 U. S. at 363.

Now I stated in my affidavit that the evidence will show that the conduct of Minnesota and its co-conspirators did [fol. 150] have a substantial effect upon the residents of the Eastern District of Illinois and the neighboring areas and, to establish my point, I ask your Honor's permission to permit the Government counsel to discuss, in a brief and limited degree, some of the evidence taken before the grand jury in this district. Would that be agreeable to the Court?

The Court: Very well.

Mr. Jinkinson: For this purpose I will ask Mr. Hernacki to make this part of the argument, and I will return to outline the points which I have just stated.

Mr. Chadwell: I didn't quite understand what he said. Did he say he was going to give some evidence taken before the grand jury?

Mr. Jinkinson: Yes.

The Court: That is what I understood.

ARGUMENT BY MR. HERNACKI ON BEHALF OF UNITED STATES

Mr. Hernacki: In its brief, your Honor, the defendant has implied in various ways that the Government is forum shopping in asking a grand jury of this District to return an indictment here. Defendant has also charged that the Government has been preparing this case since

1945. I would like to answer those two points by tracing briefly the background and investigation in this case.

In May of 1958 the Chicago office of the Anti-trust Division received a complaint concerning the activities of Minnesota Mining in the field of media or magnetic recording tape. The complaint originated in the Eastern District of Illinois. I was sent down here to investigate. I conducted a brief investigation, and upon my return the Chicago office requested and obtained authority to conduct a grand jury investigation in this District. Sometime thereafter we received additional complaints concerning the activities of this defendant in the fields of pressure-sensitive tape and aluminum pre-sensitized lithograph plates among others, and requested and obtained authority to broaden our investigation into these areas.

[fol. 151] The grand jury investigation extended from 1959, May of that year, until December of 1961. A great number of witnesses were heard in this Courthouse and a large number of documents were returned before the grand jury just before the indictment was returned. Consequently the indictment has resulted from a complaint originating in this district. It was followed up by the preliminary investigation in this district, and the grand jury investigation in this district, and a great deal of our evidence, on almost the entire bulk of it was developed by the grand jury in this district, and consequently I say that this is not an imported case of the nature of the cases which are mentioned in some of the opinions cited by the defendant.

Now with regard to the previous investigations. In 1945 an attorney from the Chicago office of the Anti-trust Division, Mr. Melvin [sic] [Melville] Williams went to Minnesota, St. Paul, and inquired into one of the three industries here involved, pressure-sensitive tape. He spoke to one or two of the executives in Minnesota, and asked for permission to see some of the documents there. The permission was denied and later on an arrangement was made whereby Minnesota did produce certain documents and permit Mr. Williams to examine them. He did examine them, asked for some copies and as a result about 340 documents, according to the testimony of Mr. Con-

nelly, were produced by the company, or given to him. Nothing further was done at that time. Eventually the documents were sent to Washington, D. C. In 1948 the Washington office of the Anti-trust Division asked the Federal Bureau of Investigation to make a file search of Minnesota Mining files with regard to tape. The F.B.I. agents went in and they were denied the opportunity of examining the raw files, but an arrangement was made whereby the Bureau or Division had to tell Minnesota what kind of documents it wanted to see, and the company then produced certain documents which it permitted the agents to examine, and an arrangement—

[fol. 152] Mr. Chadwell: I'm having a hard time hearing you—

The Court: I would suggest that you move over there, Mr. Chadwell, if you can't hear.

Mr. Hernacki: An arrangement was made whereby the agents were allowed to examine the documents, and if they desired copies the company would furnish to them. This arrangement was followed and the copies which were desired were produced and were forwarded to Washington. Then in 1952—I might say that was the extent of that. In 1952 the New York office of the Anti-trust Division inquired into Minnesota Mining again by the medium of the F. B. I. The same procedure was adopted. Certain files were made available to the F. B. I. Certain copies were made and produced to the New York office. This investigation continued for a period of time, and involved additional products not related to this case, these products in addition to tape, and I think there were several occasions in which the F. B. I. went to Minnesota Mining in this connection, so that from the period 1952 to 1957, there were several such requests for examination of files. No action was taken on tape in that regard. So there was never any grand jury investigation of this company with regard to the products here in question until the Eastern District of Illinois formed its grand jury and grand jury subpoenas were sent to the company. There were, it is true, these sporadic investigations of the company in this one product, tape. But there was never a grand jury proceeding, never the production

under compulsion of documents, over [sic] [or] of testimony either of outside persons or of the company executives themselves.

Now when the Chicago office expanded its grand jury investigation to include tape it was eventually forwarded the documents obtained by the other offices. While many of the documents were obtained in early investigations and are pertinent to this case, they constitute but a small portion of our total evidence on the tape side. Therefore, [fol. 153] the assertion that we have been preparing this case for sixteen years is unfounded we think. Moreover, as to magnetic recording tape or media or the plates there was never any grand jury investigation nor even any other type of investigation of Minnesota prior to the time this grand jury got into it.

Now maybe I should mention that one reason why the grand jury investigation required a little over two years to complete was that our request for documents was not satisfied completely almost until the time of the return of the indictment.

We were particularly interested in certain high-level or executive documents of the company and these required some time for production. So we really did not start pulling this case together, your Honor, until November of 1961, the time when Mr. Chadwell was entering the case himself, and as a matter of fact, we are at this time preparing our case for trial really for the first time, so that it is not a case where we have had sixteen years we have been sitting around, and there is some information in the brief that we are trying to decide where to put this case. That is not so. We have just put this case together very recently, and there is going to be an assertion here that we have had sixteen years and therefore they need a couple of years to prepare and this court should delay the case. I thing that is not well-founded.

Now, secondly, let me point one matter out even among some of the attorneys who conducted the early investigation have long since left the Government. Mr. Melville Williams is very happy representing defendants in anti-trust actions these days, and as for Government's counsel who will try this case, Mr. Peck first joined the anti-trust

division in January, 1960, Mr. Lindenbaum joined in August of 1961, and Mr. Fink in December of 1961, so this is not a case where all of this staff has been working sixteen years on this matter. I might point out further [fol. 154] that Mr. Chadwell has associated with him through the general counsel's office of Minnesota Mining and through the patent firm which we have discussed in our brief a number of attorneys who have had an invaluable background and experience necessary in each of these industries, and they have been there for many years, going way back, and I might say that not only have they had a knowledge of what took place but the evidence in this case will show that they participated in a number of the events here under scrutiny, so Mr. Chadwell has an advantage of all these people and he is going to—I think in one of the affidavits they point out they are going to have at least fifteen attorneys in this case and they are not all from Mr. Chadwell's office, so there is really nothing unfair in our judgment when the Government asks for an early trial in considering the facts and circumstances which I have just pointed out, they have had the advantage of people very intimately acquainted with this industry whereas the Government on the other hand has had to bone up in a very brief period of time.

With regard to the facts in the case, the evidence will show the Minnesota's conduct. I am going to call predatory conduct, that is our theory of it. This is a fact which will have to be found by a jury. Their activity began in 1931. I am talking about tape because magnetic tape activities didn't become pertinent until 1947 and lithographic plate industry doesn't become pertinent until the 50's, so the only industry we are talking about in the early years is pressure sensitive tape.

During the 20's the spray pointing of automobiles became advisable for the first time to spray, Duco, for example. At that time there was a need for a tape to be masked on a car not to be painted. At the time the only product available was cloth tape and cloth masking tape was used for this purpose. Then Minnesota developed a paper tape, and in 1930 it got a patent on

[fol. 155] that product, so it was selling this paper tape, and it became aware by announcements to the trade that another firm, a big maker of cloth tape, Johnson and Johnson, who I will refer to as J & J, was about to start making a paper tape, so the president of Minnesota Mining, Mr. McKnight, went down to New Brunswick to have a talk with the head of that organization, and that was General Johnson, R. W. Johnson. Mr. Johnson was going to start producing this paper tape through a subsidiary which made industrial tape products that was called the Revolite corporation. Mr. McKnight told Mr. Johnson that he had a patent in this field and that the patent covered the paper tape, and that he, Mr. McKnight, intended to monopolize that field. So he made a suggestion to Mr. Johnson—Mr. Johnson would stay out of the masking tape field and Mr. McKnight would stay out of the surgical tape field, meaning their respective companies. Knowing at this time Minnesota was not making any cloth tape let alone any surgical tape Mr. Johnson replied he was not interested in any such arrangement. Furthermore, General Johnson replied that he thought Minnesota's patent was far too broad and that this would be limited or held invalid upon trial. Mr. McKnight threatened to sue J & J and said that even if J & J prevailed in the action that J & J would lose, the reason being that they would lose in the field of competition and that the field would be open to hospital tape too, so Mr. McKnight proposed that if J & J would reveal to him their patent information and prior art which would be the prior research and knowledge in the industry for his examination he would then decide whether or not he thought that they could beat him in the patent case, and if he thought they could then he would license them practically on their own terms under price control, and that is of course assuming that J & J would suppress this information. General Johnson refused the offer of the staying out of the business but [fol. 156] later on he did accept this offer of showing the patent information and J & J did subsequently disclose its prior art to Minnesota Mining. Apparently it wasn't considered very strong by Minnesota Mining be-

cause they did not offer to license J & J in the masking tape field. They consistently refused to consider such a license and they had filed suit against J & J. This was done in I believe early 1932. Then when it appeared to them that J & J was going to fight the action Minnesota filed four more actions and included not only Revolite and J & J but the people who made the paper backing for this company, their suppliers, and this is the type of wholesale litigation which amounts to a great expense to a defendant. They were filed in different areas of the country and defendant had to go to different areas of the country to defend it. The same type of inconvenience Mr. Chadwell speaks of was there applicable. The filing of the action was not all that occurred of course. The Minnesota salesmen would inform the customers in the field of these actions and would tell them that if they sold this tape of Revolite they would be liable for patent infringement action. Well, as a result Revolite found it necessary to issue these hold harmless letters to the trade notwithstanding that of course they did lose business of the distributors and dealers who were fearful of handling the product. And another form of pressure was applied by Minnesota Mining in the form of a sale of a cloth tape. Suddenly Minnesota Mining came out with a cloth surgical tape. It was not a very good product but it did represent a direct threat not to the business of Revolite which was not in the surgical field but the large business of J & J which was a big maker of surgical products. So in retaliation for this action J & J told Minnesota that they were going to start selling sand paper, coated abrasives. Now Minnesota Mining had a very nice arrangement in the sand paper field. At this time they were involved in a patent [fol. 157] pool with other competitors in which all of the prices were fixed. Everybody was licensed, that is, those that belonged to the group, and it was a very, extremely stable market, rigidly controlled.

The Court: On sand paper?

Mr. Hernacki: On sand paper, your Honor. Now, to have a rebel coming into this market threatening to come in with lower prices obviously could create havoc

in this field and very well organized industry, and therefore a meeting was had betwen the parties, J & J and Minnesota, and an agreement was reached that if J & J stayed out of sand paper then Minnesota Mining would stay out of surgical tape, and this agreement was culminated and was followed. Minnesota Mining discontinued the sale of surgical tape; J & J did not go into the manufacture and the sale of sand paper.

Now in the brief on motion to strike Minnesota says this is not relevant, no part of our case. Furthermore, there is no connection between sand paper and pressure sensitive tape. I'm a little surprised at that because obviously the defendant here should know better than anyone what the situation is on sand paper and pressure sensitive tape. I would like to show your Honor a document bearing Government Number 30-3129 through 30-3158. Now this is a price list of Minnesota Mining directed to the automotive trade, and that clearly shows the relationship of paper masking tape and sand paper, the two ingredients are indispensable to an automobile repair shop. And certainly this is not news to them. They designed it for that purpose. Another factor I would to call your Honor's attention to is a book, The Brand of the Tartan, which is a so-called 3 M story, and opposite page 146 your Honor will find a picture of a man working in an automobile repair shop and the necessity for his using sand paper. Now that book is put out obviously with the cooperation and assistance of [fol. 158] the company. It deals with nothing else. So their own materials clearly show that there is a direct relationship between the sand paper and pressure sensitive tape. You might have a bump in the car. They knock out the bump and they then have to sand paper before they even begin painting it. So it is a natural product line and because it is it is obviously a great advantage to a company to be able to handle both products. Now by keeping J & J out of this natural product line Minnesota became the only manufacturer of both products selling to the industry in that fashion. And certainly it is an advantage to have a complete line over a supplier who has only a partial line. Now an

additional matter of significance here is the fact that Minnesota has the tremendous sales force and when this force goes around to obtain orders from the trade it can obtain them which they frequently distribute to distributors on both products, sand paper and masking tape.

Now when J & J first came out with paper masking tape in 1932 it began selling at prices slightly lower than Minnesota's, at least to some organizations. When this happened Minnesota immediately matched the price of J & J, and the sales manager of the company, Mr. George Halpin, sales manager of Minnesota, then contacted J & J and he offered to enter into a price fixing arrangement with J & J and that arrangement would be worked out in this fashion. J & J was making a sixty yard product and Minnesota Mining a seventy-two yard product. Mr. Halpin asked that J & J might change its prices to conform to Minnesota's, taking into account the pro rata difference in the yardage and this was—Mr. Halpin even supplied a document showing exactly what the new prices ought to be. J & J perhaps began to feel the brunt of the acts of Minnesota Mining, for what reason they did it, at least they did go along. They entered into a price fixing deal. They not only fixed the prices of the products. They fixed the sizes of the product. They fixed [fol. 159] the manner of distribution of those products. They decided what distributors, if any, should be able to receive the jobber discount and which ones should be denied the discount, and why should they be denied that —because they are price cutters and they don't adhere to the resale price. They determine the amount of discount of course as part of their pricing structure. Now the situation in the industry was this. Paper masking tape was beginning to be recognized and had always perhaps been recognized as the more desirable product for masking cars. Cloth tape nevertheless was used but it was sold at a lower price than the paper masking tape. Now Minnesota Mining was always agreeable to have a price increase so long as it could get a narrowing of the gap between the two prices, bring them closer together. This was their objective, so they talked J & J into using its influence with the other cloth tape manufacturers and

those were principally the Bauer and Black Division of the Kendall Company and the Seamless Rubber Company. So these concerns eventually got into a system and this system called for it to hold meetings at certain appointments where they would meet together and from time to time discuss what the new prices should be, who should be boycotted, the policing of the industry, and so and so is chiseling here and there, the various factors involved in maintaining the arrangement that they had decided upon. However, it was not enough that they just get together occasionally. They had to get into contact more frequently than that, so they formed a system of writing to each other, but this was not ordinary correspondence. The stationery was blank, no company letter-head, no signatures were given. Sometimes they would use initials, sometimes they didn't even do that because it would be obvious to the reader acquainted with the industry who was writing to him in this particular situation because of the nature of the correspondence. Well, this was a [fol. 160] secret, clandestine arrangement fixing prices, policing, maintaining, boycotting, obviously illegal we believe. So the arrangement went on for a number of years, a period of years, and eventually Minnesota did succeed in getting the price of cloth tape up to a par with the paper masking tape, and particularly in the Detroit market, which was a highly significant one, and when that happened the manufacturers began dropping out of the cloth tape and settling particularly on the paper tape and cloth tape stopped being a significant factor in part of this market from that point forward. In fact, in 1937 it no longer became necessary to include other cloth tape companies in the arrangement. Now, in 1936—

The Court: Maybe we had better stop.

Mr. Hernacki: Yes, sir.

The Court: Is 1:30 satisfactory?

(Thereupon, a recess was taken until 1:30 P.M. of the same day, June 15, A.D. 1962.)

June 15, A.D. 1962

Proceedings.

Afternoon Session.

The Court: All right, Proceed.

Mr. Hernacki: I was discussing, your Honor, the 1937 license agreement between the Revolite Corporation and Minnesota Mining which was the first of the license agreements involved in this case. The agreement was a very unusual one, and some of the more salient features about it were these. To begin with, the license rate began at ten percent, but it did not stay there. When the— I'll call it J & J, although it was a subsidiary, hereafter. I will use J & J, regardless of the change in name of this subsidiary. When J & J began selling more than 21.2 [fol. 161] percent of the total sales of the two companies in the automobile field why its royalty rate started jumping and it got to a point where if the share of the market of J & J ever reached over forty percent, 41.2, why the royalty rate got up to thirty percent of the sale price. In other words, J & J would be working for Minnesota Mining. In addition, J & J was precluded from selling in any field except the automotive field. It had to sell at prices fixed by Minnesota and it had to sell the kind of product manufacturing under terms dictated by Minnesota. The manner of its distribution was regulated by Minnesota. The discounts of course, the manner in which it was going to distribute, the manner in which it would package, the manner in which it would advertise, all of this was going to be regulated by Minnesota. J & J further had to agree not to manufacture sand paper, and again I say this is relevant. J & J agreed not to make a private label tape, and they agreed that it would not export tape or sell to those whom it knew would export tape, and there was a provision that in the event they sold to a company which had a foreign branch why they could make that sale but it would be at a royalty rate of thirty percent, and it provided J & J would assist Minnesota in any future patent litigation whether through testimony or in some other way. The greement provided for amendments from time to time, and these would change the prices, the stand-

ards of manufacture and methods of distribution. We generally refer to them later as Exhibit "C" amendments. The agreement though really didn't change much because the parties were doing this very thing before they entered into the licensing agreement, namely, they were fixing prices, specifications, standards, methods of distribution, classes of customers, so they didn't have to change their operations in any way. It was just that now they had a formal cloak for what they had been doing for [fol. 162] years. After the agreement was signed the parties continued to hold their meetings. They continued to police their operations at these meetings. Again they would decide what prices they were going to charge and the changes in specifications, and after the meeting was held Minnesota would then issue a formal Exhibit "C" amendment to the license agreement incorporating the change as to which J & J had agreed it would adhere to the change. And I do point out that the meeting was preceding the change and was simply a summarization of what they agreed to do jointly.

Getting into cellophane tape. The product was started being manufactured by Minnesota Mining in the early 30's. Along about 1938 J & J informed Minnesota that it was going to make cellophane tape and Minnesota objected strenuously. J & J said it didn't see why it should not make it, it didn't see any patent in existence which would cover it, and when it became clear that J & J was going to proceed why Minnesota made a proposition. They offered to buy up a fifty percent interest in the J & J subsidiary which made tape, and part of the deal would be that this J & J subsidiary would stop manufacturing paper tape and would buy its paper tape and cellophane tape from Minnesota, and it could buy its cloth tape from J & J. In other words, it would get out of the paper tape and stay out of the cellophane tape business. It would also get a license on the Minnesota patents, on [sic] [with] its price control of course, and Minnesota would agree not to make cloth tape in any field. Well, as Mr. Johnson put it, this type of marriage deserves a certain period of courtship, so he thought perhaps better they should enter into a license agreement first under cello-

phane and see how it goes, so they began negotiating for an agreement which was finally signed in 1940, and it provided approximately the same terms as the preceding [fol. 163] agreement, except that the royalty rate became a flat one of 7½ percent for paper tape. This was a decrease, and five percent for cellophane. The agreement, however, was—on these various products was put into one document, and it was provided that if that document should be cancelled, the earlier paper tape agreement comes back into effect at of course the higher royalty rates on the paper tape. The parties also agreed, including a further patent clause, which provides that in the event the licensee J & J should obtain a patent, and this is to some extent dominated by Minnesota's patent, Minnesota would be entitled to a royalty free license. If not so dominated, Minnesota would be able to get a license under the same terms and conditions as the existing agreement, which of course is price control, et cetera.

Now even before though they signed this license agreement J & J was selling cellophane tape for about a year and those sales were controlled by an agreement they had reached at a meeting as to prices and manner of the distribution, so again the agreement simply formalized an existing arrangement. Minnesota Mining was forever concerned with the retail prices as well as the wholesale prices in this trade, and whenever a situation occurred which affected the retail prices it would get after J & J to have an end put to it. One example of the control of a resale price was found in the Detroit market where J & J had two very large you might say super-jobbers, who sold to the automobile companies. And Minnesota was very concerned over the prices at which they sold to these automobile companies. It wanted J & J to control that. J & J said that they are selling—ultimately one of their positions was that they were selling as agents of J & J. Now Minnesota said that's not good enough. We want you to control the billing of these companies to assure that the price at which these jobbers resell are [fol. 164] governed by our license arrangement. In other words, there will be no less than the minimum prices we provided. J & J argued that that would violate the antitrust laws, but when Minnesota insisted that was done.

Among other activities, Minnesota engaged in, was the policing of the trade and J & J helped it in this regard. Whenever a new competitor appeared on the horizon J & J would urge Minnesota to do something about it. One of these cases occurred way back in 1933, a west coast competitor started to make a paper tape. J & J urged some action be taken. Minnesota went out, sued this organization, and then before the case came to trial bought it up, closed down the plant. Minnesota from time to time sought to buy out other competitors in the 40's and in the 50's when it found people who were making these products. They would try to buy them out. Sometimes it succeeded, generally it failed, but this was one of the manners—one of the manners in which it sought to eliminate this type of competition. During the war there was a lot of Government business. Minnesota controlled the price at which J & J sold to the Government, down to about five or six decimal points. When they were going to set up a special price for a large government order they would create a special exception to the license agreement, and this would say that for this particular bid J & J could offer a certain price, no lower than, and then they would indicate what it would be. Ultimately they finally got to a point where they lifted the price control on the Government bids during the war. When the Government learned what was going on and in considering the high royalty rate which J & J was paying on Government business it insisted that it be cut down somewhat and then that was done then, so the Government royalty rates were cut in half.

On the cellophane and paper tape from the period 1931 to 1946 Minnesota never issued any other license and [fol. 165] when people asked for a license the agreement which Minnesota tendered was so highly restricted, even compared to the J & J agreement, that they refused it consistently under the ground that they couldn't operate a business at a profit under these conditions.

Finally, as the paper tape basic patent was expiring in 1946 Minnesota began negotiating seriously with the potential licensees, the Kendall Company, Bauer and Black, and in 1947 it culminated in an agreement. J & J by its

agreement was entitled to more favorable provisions than found in any other agreement to be issued, urged that there is some in this Kendall agreement, and the parties negotiated a new license agreement which was signed in 1949, and this occasion they did succeed in separating the paper from the cellophane tape and no longer did they have this provision between them that if they dropped let us say the cellophane tape and tried to make outside the patent they would be faced with a cancellation of the paper tape agreement, and a reinstitution of the early Revolite agreement.

In 1951 and 1952 there an odd situation occurred. Minnesota's price structures in cellophane tape was such that the price for the wide rolls was far—well, was low in comparison to the prices for the narrow rolls, which were the ones in great demand, that is in proportion, so as a result a business sprung up of tape splitting. A company in Pennsylvania got a patent an a machine for splitting wider rolls of tape and made them narrower, and attempted to get the business rolling of selling these machines to industrial concerns whereby they could buy wide rolls of tape and split them and wind up saving a considerable amount of money on the same tape. He reached an agreement with Minnesota that he would sell only to industrial concerns but shortly he learned that the Minnesota salesmen were urging their customers not to buy [fol. 166] such a machine, and so he changed his policy and he then began selling to jobbers. Now the significance of this, to sell to a jobber, he is going to buy wide rolls and re-split [sic] [re-slit] them and re-sell the narrow widths which the industrial consumer was not going to do. Then he was in a position to cut the prices, in a better position let us say than he was before. Or he could simply sell at the same price and get a much bigger profit than he could otherwise. When this happened Minnesota really went to work on this man, Industrial Equipment and Supply Company, and it began —first of all it began by refusing to sell him. He too was a jobber. Not only did it refuse to sell him but it refused to sell to anybody else who re-sold to Industrial Equipment and they began policing it, trying to find out

who was supplying this man and cutting them off, and in addition they got J & J into it, urging this was part of their agreement under the license, of the J & J license, and J & J likewise began precluding and cutting off people who supplied Industrial Equipment, and eventually this man was unable to get the tape to do it himself, and as to anybody else to whom he was selling the machines they too would get cut off, so his business in a short time disappeared and not too long thereafter Minnesota finally changed its price structure to what might be called a more realistic alignment and eliminated the profit of tape splitting.

In 1952 a concern named Technical Tape began making cellophane tape. When it started it began selling to the Government institutions on bids. As a consequence the J & J subsidiary complained to Minnesota and the result was that Minnesota for the first time when a licensee asked for it dropped its royalty rate on these particular type of sales from 2½ to 1¼ percent. During the Korean War emergency Minnesota had discontinued ["as" deleted] price control on direct Government sales and after the emergency ended with Tech Tape in the field [fol. 167] it did not reinstate the price control. The [sic] ["The" deleted] Tech Tape wanted a license on cellophane. The parties negotiated but the agreement which Minnesota tendered first ["was" deleted] called for an ascending royalty rate which they refused, and then Minnesota cut it down to a flat 8½ percent royalty rate on cellophane for comparison with the five percent that J & J was paying. Now this too Technical Tape refused. Minnesota tried to buy them out, and they refused to sell, so they had a case which went to trial.

In 1955 J & J got a patent on a certain type of paper masking tape. It sought to license the industry on a mere two percent royalty without price control which Minnesota objected to, and they urged J & J to retract these offers and to attempt to get price control. J & J did make such an attempt but any efforts to get people to agree to such a license failed and therefore it dropped the efforts of getting price control in its paper tape agreements.

About the same time Minnesota and J & J became involved in an interference on filament tape. This is the tape with threads running through it which gave it greater strength. It is used in the place of strapping tape, steel strapping. After much negotiations the parties reached an agreement that ["when" deleted] instead of proceeding through the Patent Office in litigation they would try to resolve it among themselves by showing each other the proofs they had of their date of invention and the type of activity they had done on research. The losing party was to get a licensing agreement from the other party and this would include provisions to which they agreed upon. In other words, they drew up a model agreement, and that agreement provided for the control of prices, standards, specifications, and so forth. Instead of going forward however one day Minnesota made an offer to J & J of relinquishing its claim to the patents and instead taking a low royalty rate of 1½ percent. J & J accepted this offer but before the parties could [fol. 168] complete the license agreement a decision came down in the Third Circuit, *Newburgh Moire Company, Inc.* v. *Superior Moire Company, Inc.*, 237 F. 2d 283, holding that multiple price control licenses are illegal where licensor and licensee dominate the industry. As a result J & J refused to go ahead with the price control aspect of the license agreement, althought Minnesota claimed that such a decision should not bar that type of a provision. Nevertheless the agreement entered into did eliminate the price control, although it did continue a number of other provisions which had been present in the earlier agreements. A further provision included at Minnesota's demand was that in the event Minnesota offered certain proof of somebody else selling this product it could demand and get J & J to sue such a party and Minnesota would help pay the costs of the litigation.

In 1956 the parties again re-negotiated agreements on paper tape and cellophane tape, the fibrous and no-fibrous agreements. They included certain other products. For example, under cellophane tape would fall acetate fiber tape and so on.

With regard to vinyl tape, we've gone into that somewhat in our briefs. The situation occurred in 1950. Minnesota got a patent. They found that when they went out to try and license the industry, telling them that this is a way of stabilizing the industry and getting the price up that the other manufacturers weren't buying it because they felt they were outside the patent. So in 1954 Minnesota got a re-issue of this original patent which to their mind broadened the coverage and they now proceeded to sue and we have discussed the wholesale manner in suing Plymouth Rubber. They also sued Technical Tape and Mr. Jinkinson will have a word to say about where they were filed, these suits, so the situation in tape, it is pretty clear that Minnesota sought to [fol. 169] dominate the industry through the use of patents, through the use of price fixing agreements, through policing the industry and well, in regard to the latter, I will show your Honor two documents, 69-2313, 69-2309, indicating that even in the City of Danville they were active in attempting to eliminate any chance of some dealer getting a lower price from a licensee. In addition, I show your Honor some documents, 12-316 through 12-322, reflecting an agency agreement by and between Minnesota Mining and a jobber in Bloomington called Putnam. Now these agency agreements are specially devised for a situation where the jobber wants to bid to an institution, city, county, state agency, and he wants a lower price than he can normally get under his arrangement with them, so the manufacturer makes the jobber an agent, and the jobber is then given a special price to quote. In this case it is the University of Illinois. And in that particular group of documents it will show that this particular jobber quoted a competitive product although he had the opportunity of quoting the Minnesota product, and for that he was going to be denied any special prices in the future by that, but the point I wish to make is this—under that type of an arrangement, the agency agreement, the companies dictate the price to be charged or offered to these institutions. Now Minnesota and J & J, among their other agreements, had an agreement whereby on special orders and bids of this nature,

for example, to the University of Illinois, they would contact each other and decide what they would bid. This would be done in advance, after which the bids would be submitted and such an agreement continued on into 1957 between the companies. In short, this price fixing directly affected the peoples in the Eastern District of Illinois. The philosophy of Minnesota in this tape field has been that which Mr. McKnight expressed as far back as 1931, and we have a document which will reflect that, [fol. 170] namely, that he intended to monopolize the field, and certainly Minnesota did its best to do just that. It has licensees whom it practically forced into a license to accept their control over almost every phase of their operations, their pricing, their manufacturing, their distributing, even their advertising. They were obsessed with the idea of controlling prices to a point where they entered into clandestine price fixing arrangements, they boycotted customers, and entered into illegal licensing agreements, and again I speak now as protagonist for the Government here. I realize they are still entitled and always will be to the presumption of innocence, but this is our position on what this evidence shows, and when it served its purpose Minnesota entered into agreements to keep out of certain markets for reciprocal promises from its competitors. Having struck upon what was [a] highly [successful] modus operandi on an industry, Minnesota nevertheless entered other fields, namely, the magnetic recording tape. There was one fly in the ointment here, however. That was this. The patent they wanted to use was not one which they owned but another organization owned. This was the Armour Research Foundation of Illinois Institute of Technology. Over the years Armour Research had otbained a considerable number of patents in this field and was regarded as the research institute in the field of magnetic recording. Primarily, however, its research was into wire recording. In about 1946 it determined that tape recording was much superior to wire and it applied for a patent on iron oxide used in the manufacture of this tape, as well as on the finished tape product itself.

Minnesota was interested in Armour's work, and the two parties began negotiating for a license agreement.

Minnesota was not interested in the standard agreement which Armour was offering to the trade. This was an agreement at a nominal rate without any extremely [fol. 171] restrictive provisions and would mean that Minnesota would be one of many allowed to use Armour patents. Minnesota wanted an exclusive right under the potential tape patent. It wanted a right others would not have, and so it began bargaining for such a right. It culminated—to begin with, this was a bit of a dispute because Armour was a not for profit corporation dedicated to conducing research for the benefit of industries in genaral and felt it was against its principles to grant a monopoly to any one organization, that it should be open for the benefit of all. Nevertheless, Minnesota persuaded it in 1947 to grant a license under what might become a patent in the tape application, and this provided that Armour would not license any additional concerns on the making of media. There were at the time three concerns who had the right because of much earlier agreements and would get a right to make the product if the patent should issue on tape. Minnesota urged Armour to see what it could do to cut these out and Armour did work toward that end, and ultimately cut two of them out and we are just not sure at this time what happened to the third one. At any rate, none of these three concerns ever did make a magnetic recording tape. There were also some provisions in the agreements which Armour had with the manufacturers of recording devices which would give an implied right to such a manufacturer to make the tape complete on the machine so that he could sell the whole product which you could use. Minnesota insisted that in the future Armour deny any such rights specifically in the license agreements so that even the right to make a tape to put on your own machine would not go along with an agreement upon the right to use its patents on the device or recording machine. In addition, Armour was going to refuse to assist anybody in developing magnetic tape and getting into the business, was going to deny the benefits [fol. 172] of all its past research to anybody else, and this was going to continue for the same length of time

as the license agreement would be in existence. In 1949 Armour sort of slipped up. It had a right to negotiate very limited license agreements with some people in the film manufacturing end, Kodak, for example, and in negotiating one such agreement it happened to give the licensee the right to make tape generally, not just for the purpose of a motion picture film. Well, in 1953 when Armour had to tell Minnesota about this Minnesota hit the ceiling and demanded that Armour do something about it and get rid of it, so Armour went back to Kodak and got them to take another agreement removing the right to make tape generally and limiting it to just the motion picture film field. These are some of the various ways in which Minnesota sought to get a complete monopoly under this patent which it was going to then use. Now the patent didn't issue until 1954. One of the reasons was that Minnesota was not satisfied that Armour's tape application was going to cover the whole industry, so to eliminate any gaps that might be left and ways in which other manufacturers might make it without infringement Minnesota applied for some patents too and they did it to plug any gaps in the whole structure. This caused an interference in the Patent Office, two people claiming the same inventions. There were more than two but it narrowed down to these two, and because of that Armour stalled on paying—I'm sorry—Minnesota stalled on paying royalty payments to Armour. The agreement originally provided payments would begin when the Patent Office recognized the claim in Armour's tape application. Even though that time occurred Minnesota on technicalities refused to make payments and the parties again negotiated to settle this as well as some other provisions Minnesota now demanded, the right to offer sub-licenses under this tape patent when it issued. Armour wanted some money. [fol. 173] Minnesota wanted this license. Armour was practically foreclosed anyhow by this time, so they signed a new agreement in 1954, and under this new agreement Minnesota now got practically complete control of this patent and had the right to issue sub-licenses. At that point, or shortly before that, when they knew it was

going to get it they conceded priority to Armour and aided it in getting it at the Patent Office. The patent issued on November of 1954. Before it even issued Mr. McKnight went around to two of the large manufacturers of tape who competed with him, that is large in the sense that they were larger than the others. No firm other than Minnesota Mining was large in this field. About this time Minnesota had approximately fifty percent of the tape business, Audio Devices and Reeves Soundcraft had twenty a-piece, and two concerns, Technical Tape and Orradio Industries had the rest between them. It went to Reeves Soundcraft. Mr. McKnight told Mr. Rogers there that he was going to get the patent on this product and that he was going to stabilize the industry with this patent, going to get prices up, prices were too low, and that his firm had better get in with them while they could. He then offered them a licensing agreement and they got into a discussion of the kind of agreement and they had several sessions. One of the points that was brought out—Rogers pointed out that a little concern like Orradio couldn't live under these prices, that is, offer its products at the same price as Minnesota and live because it was a poor quality product it would go out of business. Mr. McKnight says—well, if they [go] bankrupt, Minnesota may buy them out, and finally by Mr. McKnight indicating Mr. Rogers had better come along now or do it the hard way, and Mr. McKnight indicated Minnesota would drop the price so low nobody could live. Ultimately Mr. Rogers rejected the license offer, probably because of the Section "C" amendment [fol. 174] proposed. In this industry it was known as "A". This was going to cover not only the type of reel on which the tape was going to be wound. It was going to cover the type of cardboard box it was going to go into, the number of colors which you could put on the box, the thickness of the paper on which it was to be bound and so on and so forth. In other words, complete and great detail on the product and even to the labels which were going to go around it. One of the objections made was that it would violate anti-trust laws. Mr. McKnight also went to Audio Devices and offered them

the same proposition. Audio also claimed this would violate anti-trust laws. Mr. McKnight said it wouldn't, urged that they take it now or there would be stiffer conditions later. They turned it down. It was understood in these negotiations that under no circumstances would Technical Tape ever get a license. The breakdown on the negotiations occurred in 1955, and at this point Minnesota caused Armour to file suits under the patent. There were three suits filed. They were against Technical Tape in Chicago, the C. K. Williams Company at East St. Louis, Illinois, and Orradio in Alabama. The suit in Chicago was ultimately transferred to the Eastern District and joined in with the C. K. Williams cause, and the one in Alabama was delayed pending the outcome in East St. Louis, so it became crucial now as to what happened to the East St. Louis situation, as to whether Minnesota was going to get its usual type of control of this industry. The key of course was the C. K. Williams Company because C. K. Williams was the manufacturer of the iron oxide which was placed on the tape backing to form the magnetic recording tape. This is the crucial ingredient on the manufacture of this product. C. K. Williams was making it for the other manufacturers in the field and Minnesota felt that if they could control this manufacture of the key ingredient they [fol. 175] could control the industry, so the proposition they offered C. K. Williams was this—to take a license and then we will set the royalty rate at such a figure that when the product is finally put on tape it will amount to five percent of the sale price on tape, and since only a quarter of a pound of oxide is used in the manufacture of the standard reel of tape this would have meant a tremendous price hike on the product C. K. Williams was selling to the trade. A second feature was of course that C. K. Williams could not sell to anybody who was not licensed under Minnesota Mining, so you either took a license from Minnesota Mining or you didn't get the oxide. This was what they were gunning for, and Mr. McKnight came down to the Eastern District of Illinois, flew down in a private plane, met Mr. Larry Ayres and they went across the river to the Mis-

souri Athletic Club and there they dickered and Mr. Ayres indicated that he just couldn't see entering into such a type of arrangement. He was interested in a license agreement but he couldn't see this particular kind of a license agreement. For one thing, it was a violation of the anti-trust laws. Mr. McKnight assured him it didn't violate the anti-trust laws but indicated either in this discussion or his representatives indicated at another one—it is not clear yet—that Minnesota was buying a good deal of C. K. Williams' products in other fields, namely, in roofing granules. Iron oxides are used to produce coloring which goes on the granule which winds up on the roof, and it was quite a large business which C. K. Williams had with Minnesota. It was pointed out to Mr. Ayres that in the event they couldn't see eye to eye why they just might have to give that business to Mr. Ayres' competitor which would hurt them a little bit, and Mr. Ayres still wasn't buying.

Then came another form of pressure. Minnesota indicated that they were putting in a plant at Cokely, Ohio to make certain iron oxides for their roofing gran- [fol. 176] ules, only a few of them, but if Minnesota was unable to reach an agreement with Mr. Ayres they just might expand that production in that plant to cover a much larger gamut of iron oxide and start giving C. K. Williams a lot of competition, and that this might prove to be very disastrous to C. K. Williams. Much to the credit of Mr. Ayres he did not succumb to this kind of pressure. He resisted and ultimately the case went to trial. It went to trial at East St. Louis before Judge Juergens, and it was decided in 1959. The appeal was decided in 1960. The patent was held invalid for prior art. This is the same patent incidentally which Minnesota Mining in its correspondence and all did not think too much of really. Nevertheless it felt it was useful enough for its purpose.

One other manner in which Minnesota Mining was taking advantage of the siutation it had with Armour and its control over Armour was this. It caused Armour to enter into a tying in arrangement with one set of patents with another. This was a case that involved

R.C.A. R.C.A. had developed a machine called a Dismak machine, which was going to be a very extremely high priced computer I presume similar to Univac which they wanted a license from Armour to make. Armour was agreeable to licensing them and they did in fact sign a licensing agreement in 1954, but after the agreement was signed R.C.A. discovered that the magnetic drums which they were going to use in this machine would involve a form of media and Armour informed them that were not permitted to license anybody to make any type of media. Well, R.C.A. said how are we going to make this type of machine if we can't make this type of media. As a result Armour went to Minnesota and Minnesota wrote back and indicated—yes, we are willing to sell them iron oxide for the purpose of making this particular type of magnetic drum. However, it has to be understood that [fol. 177] this oxide will be used for this purpose only and for not any other purpose. Well, Armour then took that letter and made it part of a license agreement with R.C.A. and the effect of it was this, that R.C.A. is allowed to make this type of machine so long as and only so long as they buy their media from Minnesota Mining. And of course when they buy from anybody else then they are outside the license agreement and subject to a suit for infringement.

Well, I have gone on here—let me simply say that the situation in plates was again the same modus operandi. The patent was applied for in 1950. It issued in 1955. The next day, the very next day Minnesota sued A. B. Dick Company in Chicago. The parties dickered for a license agreement. A. B. Dick said it was illegal, the kind they were suggesting. Nevertheless, Minnesota insisted and so they signed an agreement to fix prices, standards, specification, et cetera. The agreement was culminated in 1958 and month later Minnesota filed suits against other companies in the field. Now because there were other producers in the field Minnesota Mining did not fix the price at that time. Of course, had it done so, by simply selling a little below them competitors could get the business, so they had to bring the others into the fold before they could fix the price effectively. They

sued two organizations. One was a pretty big company called Harris Intertype which had a subsidiary called Lithoplate. The other was a small company called Polychrome. They filed only one suit against Lithoplate but they filed a number against Polychrome which are outlined in Mr. Jinkinson's memorandum. They not only sued Polychrome in Chicago. They sued a Polychrome distributor in Wichita, Kansas; they sued a Polychrome user in Cleveland and they sued three salesmen of Polychrome in Chicago. The evidence will show the reason for throwing the salesmen in was to keep the case in Chi-
[fol. 178] cago on a motion for transfer. The Polychrome organization, suffering under this, had to change its entire form of distribution because the distributors, frightened by the suits against another distributor, stopped handling their product; so they had to begin selling with their own representatives. They had to hire a bunch of salesmen and changed their method of operation, and as late as 1961 Minnesota again is offering those license agreements like always, not changing their ways of operation in the slightest, and it is clear from their statements in their briefs that they don't intend to change their way of operating. They are going to keep right on doing it. They say they are operating legally; say they see no reason to change.

We are not involved in a case where there's been a bank robbery and the job is all over with and done with. It is a continuing situation every day. We are involved in a situation where certain of Minnesota's competitors are in financial straits. The burden of trying to conduct the litigation they have been under is oppressive to them and they are now hurting. This is a situation where if the relief is going to be affected [sic], [effective] it should be had soon. Now the cases we have cited in our brief establish that when a defendant is charged with violations on a nation-wide scale which affect peoples in many areas of the country it may and it should be required to stand trial in the area where its conduct has substantially affected the residents of that community. Certainly the facts I have outlined disclosed that this is a nation-wide business and Minnesota is operating on a

nation-wide scale. Moreover, this defendant is not simply sitting in the twin cities as was true in one of the cases they cite in their brief, and then discovering low and behold they are being sued in some far distant forum. This is a case where defendant has traveled all over the country in pursuit of what we argue is its illegal [fol. 179] objective. It went from one part of this land to another to threaten to sue, to coerce, to police, to maintain what we urge as an illegal domination of the industry. This defendant flew to many parts of this country, including the Eastern District of Illinois, in its efforts to gain monopoly power. The people of the Eastern District have been wronged by reason of its conduct and they, like others, have been denied the right to purchase products at competitive prices, to purchase whatever kind of product a competitor desired to make, to have him merchandise it in any manner he saw fit. They have been denied the opportunity of having the product made free from Minnesota's control, a product which Minnesota didn't want to make. They have been subjected to coercion, to extreme pressure. Mr. Ayres, if he sells oxide for the next twenty years probably will never regain the amount of costs he suffered because of this litigation. People in the Eastern District have been required to stand trial in the District Court, in this area, for the reason that they simply would not accept a license arrangement which was unlawful. An arrangement which would be reasonable, they were willing to accept, but not this one and for that they suffered. They deserve the protection of this Court, and since defendant's conduct has rendered it liable for judgment in this district, I submit that this case should be tried here, notwithstanding some inconvenience to this defendant.

Now, your Honor, Mr. Jinkinson will proceed with the remainder of our argument.

ADDITIONAL ARGUMENT BY MR. JINKINSON

Mr. Jinkinson: Your Honor, I appreciate the patience which the Court is exhibiting to Government counsel. I am sure the Court realizes the seriousness of this motion. I am sure before I finish my argument I will convince

the Court why it is that serious, and why I take this much time.

Our remaining argument will be devoted to the topic [fol. 180] such as burden of proof, the big case being tried out of town is not a hardship, Danville is not an isolated place, the items which Mr. Chadwell devoted time to in his argument.

I would like to touch upon another matter involved in this case which I think your Honor should consider. That is the need existing in these industries for a speedy adjudication. As I stated in my affidavit, certain of Defendant's competitors are in weak financial condition, and the relief, if it is to be effective, must be had soon. The Defendant admits that it is continuing the conduct alleged to violate the law and expresses no intention of halting it.

Therefore, since time is of the essence, the condition of the respective court dockets becomes a matter of concern. Parenthetically, it is interesting to note that the Defendant originally urged the condition of the Court's docket as a factor for the Court's consideration, but now he takes the position that, even if delay could result from the transfer, it should not be determinative. However, such delay may prove to be determinative to Minnesota's competitors if this case is stalled for another year or two. Furthermore, if as the indictment alleges, Minnesota's licensing arrangements and other policies are unlawful, Minnesota should not be allowed to continue to reap the benefits of this illegal pursuit. The continuing violations should be halted and promptly, instead of allowing legal maneuvers to extend this activity until most of the patents have expired.

Mr. Fink, of the Government staff, went to Minneapolis, and obtained the latest information he could from the clerks of that district and from the United States Attorney. He also obtained the information available from Mr. Werner in this courthouse. Defendant does not like the figures we obtained, perhaps because they show that the case load per judge in the District of [fol. 181] Minnesota is almost double that of your Honor's. Mr. Chadwell claims it is unfair to compare the

average case load per Minnesota judge with that of your Honor's. The reason we do this, however, is that we are informed that the following system is employed in the District of Minnesota—regardless of the division in which the case is filed, almost all cases are tried in the Twin Cities. These cases are placed in a pool and the next case to be assigned is done so informally to any one of the four judges who is able to take another matter. That system of course is not employed in this district. As to the Defendant's quibbling over dates and whether the cases were properly counted, Mr. Fink asked only for cases which were due for trial. The cases were not selected by Government counsel, but by the respective clerks, and were recorded verbatum [sic] [verbatim], thus constituting the latest obtainable information on the condition of the dockets.

While Defendant has supplemented this latest report on the docket conditions by the observation that there is also a current anti-trust grand jury investigation going on in Danville, it has not contested the accuracy of our figures. I think this Court can rest assured that had the Government overstated the situation in the District of Minnesota in any way it would have been called to the Court's attention with a counter-affidavit.

It appears clear from the condition of the docket in the District of Minnesota, if this case were to be transferred, that there is no chance of it getting to trial there in 1962, and probably not even in 1963. I think your Honor is the person most qualified to compare that situation with the docket in Danville. I will only say that I am hopeful in the event this motion is denied, as we urge, that this case can be set for trial in Danville, early in this Fall, a date which Defendant knows we cannot expect to get in the District of Minnesota.

[fol. 182] We have shown the Court that this is not an imported case but one in which the criminal conduct alleged has had a substantial effect upon the residents in the district. We have further shown that transfer of the case would delay the trial for at least a year and probably longer. Therefore, the burden rests upon the Defendant to show some compelling need, other than its mere incon-

venience, to cause this Court to invoke its discretion and transfer the case. This burden it has failed to carry.

Certainly, the simple fact that Minnesota will be required to try a protracted case in an out-of-town forum does not place its inconvenience in the hardship class. The listing of patent litigation in which Minnesota participated since 1932, and which is attached to my affidavit, shows that Minnesota either filed or inspired the filing of forty-four suits and Defendant has called attention to one which we had missed, making a total of forty-five, every one of which was filed over four hundred miles away from the Twin Cities. Now, your Honor, from your experience I known that you are well aware of the fact that patent infringement suits, like anti-trust suits, are regarded as protracted cases by the courts.

The Defendant seeks to belittle the assertion that in the trial of these cases it has travelled a large staff of lawyers, company officials, and employees, and large quantities of documents by pointing out that it had only one attorney and a limited group of employees present during the C. K. Williams case in East St. Louis. Defendant failed to mention the fact that in the C. K. Williams case, Minnesota was also paying the fees of the attorneys hired by Armour Research, which attorneys were charged with carrying the burden of the case. Nor does Defendant mention how much manpower was consumed in the trial of the vinyl tape case in High Point, North Carolina, involving Sears, Roebuck and Plymouth Rubber, or in the [fol. 183] cellophane tape case in New York involving Technical Tape. Minnesota's patent infringement trials have run longer and involved more documents and witnesses than many an anti-trust case. Indeed Minnesota's own records show that Minnesota has spent millions of dollars in its patent litigation.

So if the trial of a protracted case in a distant forum is a severe hardship to the company, then poor Minnesota Mining has been subjecting itself to this kind of punishment for years. Perhaps one of these days, Minnesota's executives will tell its patent counsel all the things they have been telling Mr. Chadwell as to the hardship of trying big cases out of town.

While I am on the subject of the big case, let me say that there is another "factor" which may also be involved in some of the recent transfers of anti-trust cases, which factor Mr. Chadwell did not list. That is that some judges, faced with the prospect of trying a big and important case involving unusual and complex problems of law, highlighted with intense interest on the part of the public, the press and other news media, may have found the opportunity of quickly disposing of such a hot potato too tempting to resist. I think it stands to the credit of this Court that it did not leap at defense counsel's request that all other motions be deferred until the motion to transfer had been resolved. I feel confident that, however this motion is determined, it will not be influenced by a desire on this Court's part to shift the responsibility of this trial to another judge.

In its reply brief Minnesota asserts that it had to file the cases it did out of town because it had to go where its defendant had a place of business and this is true as to a few of the suits. But I observe that a number of actions were brought, not against a competing manufacturer, but against distributors and retailers of competing [fol. 184] products. At the same time, however, distributors and retailers were selling the same competitor's product in the State of Minnesota yet the Defendant decided to sue out of town. Why? For example, why should Minnesota sue three dealers of Plymouth Rubber tape in High Point, North Carolina when the product is being sold by dealers in the Twin Cities? Why should Minnesota sue the Boston competitior, Plymouth Rubber, in Chicago, and, at the same time, sue the Chicago concern, Sears Roebuck, in High Point, North Carolina? The answer is that Minnesota is a forum shopper, willing to inconvenience itself to some degree in order to place its target in a disadvantageous forum.

Additional evidence of its forum shopping nature can be found in a copy of intra-company correspondence between McKnight and Westbee, Document No. 12-8753, which I hand to the Court for its consideration. In that document McKnight recommends that Minnesota find some justification for suing a certain competitor in a

circuit favorable to patents. Still other evidence is contained in two other documents, Numbers 12-9493 and 12-9504. I will not discuss them on the record since the Government agreed to advise Defendant of the time when they would be offered in evidence, at which time Defendant would have the right to claim attorney-client privilege. As to Document 12-9493, I believe your Honor will find it more understandable by reading the last page first. In yet another Document, Number 12-1024, a Minnesota attorney adds three salesmen as defendants in a suit against a New York Company, Polychrome, filed in Chicago for the sole reason of preventing transfer to New York City. As the record of its suits and as these documents reveal, Minnesota is a forum shopper willing to inconvenience itself deliberately in order to place its victim in a disadvangeous forum.

[fol. 185] One final point on this topic. We charged in our brief that Minnesota conducts litigation, not as an extraordinary or unusual event but instead, as a planned element in its business routine. In the last decade alone, Minnesota filed or inspired the filing of 29 patent actions—for an average of three per year—and this only in three of its industries. In its reply brief, Minnesota denies that it is in the business of litigating, yet this company's propensity to sue is notorious in the trade. As a matter of fact, the defendant even boasts about it. I show your Honor an article in the Business Week issue of October 14, 1958, at Page 114, which resulted from an interview with Messrs. McKnight and Beutow, the latter being president of Minnesota, which article shows that Minnesota views litigation as part of its business.

Your Honor, I suggest that if this motion is not decided today, and before the Court decides this matter, I suggest that the Court read this article. I'm sure you will find it most interesting.

Mr. Chadwell: I didn't hear what Mr. Jinkinson said, your Honor.

Mr. Jinkinson: I said—

Mr. Chadwell: I didn't get that.

Mr. Jinkinson: I said if this motion is not decided today before it is determined, I would appreciate it if the Court would read this October issue.

The Court: Have you seen all of these?

Mr. Chadwell: No sir. I have not seen any of them, and I assume I will have the opportunity.

The Court: That's right.

Mr. Jinkinson: You haven't seen the Business Newsweek but have certintly seen the documents which I have handed to the Court.

Mr. Chadwell: Perhaps I have, but I am not familiar with them.

[fol. 186] Mr. Jinkinson. You had copies of them.

I say to this Court that if this company can travel a substantial number of people and materials to try protracted cases in distant forums, then it can face trial in Danville.

Defendant swears that it will need no less than twelve of its executive[s] present during the Government's presentation of its evidence, a number of whom will testify for the defense, and that their absence from St. Paul during this period will greatly inconvenience the Defendant. Perhaps I can help to ease this problem by advising Defendant here and now that the Government will ask the Court to invoke the rule by excluding all prospective witnesses from the courtroom during the proceedings.

Secondly, if Minnesota insists that said executives be in Danville, notwithstanding that they could not be present in court, their absence from St. Paul will not greatly impair the operations of the company. We are not here dealing with a company with only one place of business where all the work is done and where the executives are present constantly. Minnesota has no less than thirty-three plant locations, twenty branch sales offices, and seven domestic subsidiaries, all of which are scattered throughout the country, in addition to some twenty-one companies in foreign lands. All the men named by Minnesota, as being responsible for conducting licensing negotiations, are away from St. Paul frequently for various reasons, including the fact that they are responsible for the operation of distant manufacturing plants. Indeed, the evidence will show that Minnesota had difficulty on occasions in arranging meetings with competitors because it couldn't get its traveling executives together in one place at the same time. Thus, if the rule excluding wit-

nesses is to be invoked, a number of these people will not be allowed in the courtroom before the time of their testimony. If Minnesota nevertheless insists that they be in [fol. 187] Danville, past history indicates that such executives have successfully operated at long distances from St. Paul and could do so from Danville as well.

While on the subject of travel, I would like to make a comment about all these airline schedules, train schedules, time spent in travel, etc., which Defendant emphasizes. From reading the briefs and listening to Defendant's argument, a stranger would think that Danville is some backward community located in a remote and almost inaccessible mountain or desert region. I find it hard to believe that this city, only a two and one-half hour drive from Chicago, Springfield, or Indianapolis, is as remote from civilization as Defendant seems to think. Your Honor knows far better than I that the city of Danville, located near the center of our country, is readily accessible from every section of the United States—that, while it does not possess all the airplane and rail facilities of that greatest transportation center of all, Chicago, its facilities are more than adequate and far superior to most cities and it is close enough to Chicago to employ its facilities when desired, not to mention other cities nearby, such as Indianapolis.

In addition, Danville is fortunately endowed with an excellent highway system. I realize that it may come as a shock to Minnesota and its representatives, but, even in this year 1962, there are some people who yet employ what Minnesota apparently regards as a primitive mode of conveyance, namely, the automobile. This backward class, I am forced to admit, includes Government counsel and a number of its witnesses. Since Danville does have an excellent central location and more than adequate facilities for travelers, I deny that distant witnesses should suffer any great inconvenience because of the location of, or means of transportation to, Danville.

[fol. 188] Now, the defendant has expressed considerable concern over the problems its executives might have in making plane connections to Danville. I think your Honor might be interested in learning just what kind of connections the Minnesota legal staff now in this courtroom

made in reaching Danville on other previous appearances here. I think your Honor might find that they came via one of their Company-owned planes. I hand your Honor a copy of the 1959 Management Committee meetings of the Company and direct your Honor's attention to the March 30, 1959 meeting which shows that Minnesota owns a number of planes and operates what amounts to a private airline for the benefit of its executives. As the facilities of the Danville airport are readily available, it is clear that Minnesota's executives can employ Minnesota's planes whenever they wish, to shuttle whatever people and documents they need. So this Court need not concern itself greatly with commercial airline arrival and departure times between Minneapolis and Danville—these people can set their own schedule.

As a special element of hardship, Minnesota contends that to disprove the Government charges of coercion, price-fixing, and conspiracy, it will be necessary for the members of the jury to visit Minnesota's factories around St. Paul so that they may see that it has products of superior quality and therefore, presumably, that Minnesota didn't have to conspire or coerce in order to get where it is today. The issue in this case, however, is whether or not Minnesota conspired or coerced or fixed prices and it doesn't matter one whit whether its products were the best in the world or were invented by geniuses. If Minnesota did the things charged, it should be found guilty and if not, it should be acquitted. So, in this case, a view of the plant facilities is not only unnecessary but wholly irrelevant, and I will serve notice right now that the Government will strenuously object to any such [fol. 189] effort to propagandize and influence the jury with irrelevant displays.

Another hardship argument advanced is that the physical condition of Mr. McKnight is such that it would be an extreme hardship for him if he had to come to Danville. I am not going to pass on the question of whether this man, as they aver, must be present for practically the entire trial—that is strictly up to them. The corporation only is the defendant here. But I am not satisfied that we have had an adequate statement as to McKnight's present physical condition. Certainly, the mere

fact that he is seventy-four years old doesn't mean he cannot go to court. In affidavit and brief the defendant seems to picture Mr. McKnight as an old and feeble man. Just how incapacitated is Mr. McKnight? We are informed that Mr. McKnight owns a home in Miami Beach, Florida. And I would like to call your Honor's attention to a copy of the Miami Herald, dated April 29th of this year, to the Women's Section, where your Honor will find a picture of William L. McKnight dancing at the Bath Club this winter. You will also find Mr. McKnight entertaining at a dinner party or dancing party at the Surf Club. We are informed that Mr. McKnight has an interest in a stable of horses, which were entered in a number of races at Hialeah and Tropical Park at Miami Beach this winter.

The Court: Is this Mr. McKnight with the mustache?

Mr. Jinkinson: No. It is the one that's got the circle around him.

There is a custom at these tracks to take a picture of the winning horse and jockey along with the owner of the horse. I show your Honor a picture taken at Hialeah race track on February 3rd of this year, some eighteen days before Mr. McKnight signed his affidavit, and your Honor may recall that McKnight's affidavit was signed in Dade County, Florida, which is Miami Beach. The [fol. 190] man holding the reins of the horse in the winner's circle has been identified as Mr. McKnight.

Mr. Chadwell: You don't think he rode the horse, do you?

Mr. Jinkinson: How's that, Mr. Chadwell? No. I dont think he rode the horse. I do claim the horse was kind of prancing around. I don't think Mr. McKnight needs to ride the horse. I think he can hire someone else to ride it for him.

Similarly, here is another picture taken March 3rd this year at Hialeah and another one taken at Tropical Park race track on December 28, 1961, and another January 31, 1962 at Hialeah. So much for Mr. McKnight's physical condition. None of these pictures show or depict Mr. McKnight as being very ancient or crippled in any way.

The Court: Well, he is just a young fellow at seventy-four. I am sure of that.

Mr. Jinkinson: Now he also makes a claim in his affidavit that to be in Danville, he would be away from his St. Paul doctor. We are informed that Mr. McKnight has spent practically the entire winter in Florida during recent years and that the past year was no exception. He'll be much closer to the doctor while in Danville than he was in Miami Beach; and with the company plane, he is only about two hours from St. Paul. Perhaps I should point out that the first company plane was obtained for the personal use of Mr. McKnight.

As for the suggestion in McKnight's affidavit that he will be required to undergo a heavy expense if he must appear in Danville, I do believe that this, coming from a man who owns over 2,741,000 shares of Minnesota's stock, about 5.3% of the total, plus three or more homes, a yacht, ponies, and New York stage theatres, among other things, this is really scraping the bottom of the barrel. If defense counsel want him here, I'm sure that Mc-[fol. 191] Knight has the means to secure whatever comfort and assistance he wishes. In fact, he just might find the climate of Danville a good deal more pleasant than that of Minneapolis.

Let me address myself for a moment to this question of convenience to the Government. Defendant, in its affidavits and briefs, swears that Minneapolis-St. Paul is more convenient to Government counsel than Danville. When we deny that in our affidavits and brief, Mr. Chadwell says the Government is inconsistent. Before it said that convenience to Government counsel didn't warrant consideration—now it says the case should not be transferred because it will inconvenience the Government.

I will reiterate that it is the Government's view that neither the convenience of Government counsel nor that of defense counsel should affect the Court's decision. The Midwest Office is prepared to and does try cases in places almost as distant as those Minnesota selects, for example, San Antonio, Texas and Charlotte, North Carolina, where we no doubt brought the same number of documents but fewer attorneys than did our defendants. As an aside, let me say that when I read Defendant's affidavit to the effect that it will have about fifteen attorneys present for the trial, my conviction that we had a good case here was

reinforced. So, if we must, we can and will go to Minneapolis-St. Paul without suffering great personal hardship. However, when Defendant seeks to make an issue of the Government's convenience and makes affidavits to that effect, I don't think that I have to accept it when I know it is not true. Therefore, I point out to the Court that four Government counsel have traveled here from Chicago by car in two and one-half to three hours and returned home the same day. Since it would require a full day to drive over four hundred miles to Minneapolis, and another day returning, we probably would travel by plane. The difference in the round trip cost for four men would be [fol. 192] as follows: To Danville and return to our residences— 380 miles at ten cents a mile, or $38.00. To Minneapolis and return—jet coach, without tax $204.80, plus taxi fares—a difference to the taxpayer of over $166.00 per motion, and I know from past experience that Mr. Chadwell is not through filing motions in this case.

Similarly, I don't think this Court should concern itself with where Government or defense counsel might set up their offices for the trial of the case, but since Defendant swears Minneapolis is more convenient for the Government, Mr. Fink's affidavit shows that the U. S. Attorney would be hard put to accommodate us in Minneapolis, although he has more space in St. Paul. Defendant points out that Fink's affidavit says nothing about facilities in Danville. Well, the Division tried the A & P case in Danville, before Judge Lindley and a staff of ten people, lawyers and stenographers was satisfactorily accommodated at that time. I'm sure that the Government's smaller Minnesota Mining staff will receive satisfactory quarters also.

As to the location of the documents, your Honor will recall entering an order impounding the grand jury documents in the cutody of the Clerk of the Court with the provision that the Government would be allowed to remove the documents for the purpose of copying or returning said documents to the respondents. The Government recently completed its copying of the documents to be retained and has returned said documents to Danville. The balance of the documents were returned to the respondents. Therefore, all the pertinent grand jury documents

are now resting in the Clerk's office next door. Since Mr. Chadwell makes the location of documents a point in issue in this cause, I point out that it will be costlier to the taxpayer if we have to ship the documents from here to Minneapolis. Also, since Mr. Chadwell has copied many [fol. 193] documents for the defense which are in his Chicago office, he wil have to ship those documents whether this case is transferred or not.

With respect to the convenience of the Government's witnesses, again Defendant swears that Minneapolis will be more convenient and again the Government denies this is true. Your Honor has my affidavit stating that a substantial number of the Government's witnesses live within a three hundred mile radius of Danville as compared to only one or two of its minor witnesses living within three hundred miles of Minneapolis. It also avers that Danville is closer and more convenient for the majority of the Governmen's key witnesses.

Reading Defendant's reply brief, it seems to suggest that my affidavit on this point should not be believed. I don't quite know how to answer that. As an officer of the court, I strive to be accurate in all my statements to this or any other court, and particularly so in the making of an affidavit. I think I am able to discern who my key witnesses are in this case and, based upon their location, to evaluate their convenience. This I have done and the results have been submitted under oath.

Now, if Mr. Chadwell believes that, by attacking my affidavit in this fashion, he can use this motion to tranfer as a means of getting either the names or addresses of my witnesses, he is mistaken. I would not give such information to him on his motion for a list of the grand jury witnesses, nor a motion for a bill of particulars, nor will I do so on this motion. The case law holds that in a criminal case the Government should not be required to give Defendant a list of its witnesses. Mr. Chadwell cannot cite a single criminal case where the Government, over objection, was required to give a list of its witnesses to a defendant. This being so, I will stand on my affidavit; if Mr. Chadwell has any facts to refute said averments, I should like to hear them.

[fol. 194] Let me remind the Court of one very interesting fact—that not more than three months ago, on February 21, 1962 to be exact, this Defendant advised the Court in this very courtroom that it was considering a transfer of this case, not just to the District of Minnesota, but also to Chicago. It is of course pure coincidence that the very day counsel stated that he couldn't make up his mind as to whether or not to transfer this case to Chicago or St. Paul, Mr. McKnight was signing his affidavit in Miami, Florida, which states that the transfer should be made to St. Paul. Now Chicago is over four hundred miles away from the Twin Cities, yet, the defendant was considering traveling that distance with its executives, including Mr. McKnight, with its attorneys and with its Documents. Since it is obvious that all these people could not be accommodated in Mr. Chadwell's offices, they would have had to lease office space and equipment and hire secretaries, just as they say they must do here, although they would have to pay more in Chicago than in Danville, I might add. They would have their executives away from headquarters and no doubt would undergo the expense of long distance telephone calls. Mr. McKnight would be away from his home—all three of them, that is, and his favorite St. Paul doctor. In short, Minnesota was considering undergoing all the inconveniences we have been hearing about, only three months ago. Now why, I ask, could they consider traveling over four hundred miles to Chicago, but not go an additional one hundred thirty-one miles to Danville? Can that additional one hundred thirty-one miles make the difference between minor inconvenience and unbearable hardship?

What is the savings between Danville and Chicago? About the only difference I can see is the saving of the fee to Mr. Hickman and whatever additional cost is involved in negotiating the added one hundred thirty-one [fol. 195] miles. That is hardly a ponderable element in the total cost of this case. Could it be that Defendant was considering Chicago because transfer to that district would most certainly delay trial a few years? Certainly these counsel are aware of the fact that over two hundred fity private anti-trust suits are now pending trial in Chicago, not to mention a number of Government anti-trust

actions. Surely, they are aware that the Northern District has a tremendous backlog of cases and that the average time required before a case comes to trial is far behind the national average. If it wasn't for the purpose of delaying the trial, why were they considering Chicago at all—know [sic] [knowing] that, with minor exceptions, they would have to undergo the same inconveniences which they now urge constitute a hardship amounting to an injustice? This temporary willingness to go to Chicago, it seems to me, renders questionable the assertion that the inconvenience of traveling to Danville amounts to a hardship.

Transfer of this case to Minnesota will also accomplish a postponement, which, while perhaps not as bad as Chicago, would amount to a delay estimated in excess of a year. This year or two means that Defendant will reap the benefits of conduct for which they stand indicted just that much longer. Minnesota hasn't halted this conduct, claiming that it doesn't have to stop. It continues license relationships which are charged to be illegal, it continues to control the manufacture of competitor's products, it continues abusing the patent privilege to the injury of some competitors who may not be able financially to withstand such conduct much longer.

Perhaps Minnesota thinks it only fitting and proper to run around this country fixing prices and tying up competitors in a straight jacket of a license agreement upon penalty of tremendously expensive litigation if they refuse to oblige—to sue the recalcitrant ones in forums [fol. 196] far distant from their home, even if Minnesota is also inconvenienced and than [sic] [then]—when this conduct is to be scrutinized by a court and jury, to run back to its headquarters and cry: "You have to try me at my home." It's especially nice when you are the big fish in the home pond—and there is no doubt that [sic] [but] that Minnesota Mining—who I understand is the largest employer in St. Paul, is a big fish in that city. Streets have been named after its executives, such as Busch Street and McKnight Circle. Some idea of Defendant's position in the Twin Cities was presented to the grand jury in the testimony of one of the vice presidents of the company, who testified in effect, that so far as the people in that area are concerned, Minnesota Mining can do no wrong.

Your Honor, pursuant to Rule 6 C, of the Criminal Rules of Federal Procedure, we ask the Court in the interest of justice [to] be permitted to read to the Court from Page 6856 of the transcript of the grand jury proceedings in this district, the testimony of one paragraph, of Lloyd Hatch, a vice-president in charge of New Products Division of Minnesota Mining. Mr. Hatch testified as follows:

> "The Jewett plate created a minor sensation rather rapidly and news spread rapidly throughout the industry, and with this success I was told we should test further. I agreed. I said we should test outside of the Twin Cities, because everything Minnesota Mining makes is perfect. They will give you any report—whatever we do is right—so you don't get a very objective report so we have to get out of the city to test it so we decided that Chicago was a very critical place, a large factor in the lithographic industry and that's where we should go and test the plate."

Now, your Honor, here is the vice-president of Minnesota Mining Company, under oath, testifying that a product that Minnesota Mining has developed cannot be test- [fol. 197] ed fairly and squarely in St. Paul, Minnesota. He testified that it is necessary for Minnesota to remove itself from St. Paul so they can receive an objective test on the product which they have produced. It is into this surrounding and this atmosphere that Mr. Chadwell invites me to participate in a jury trial. I say to Mr. Chadwell—no thank you. I am interested in Mr. Chadwell receiving a fair and impartial trial for Minnesota Mining. I am also interested in the Government receiving a fair and impartial trial for the Government, and on the basis of the testimony of Mr. Hatch, I challenge where any court would decide that the Government can get a fair trial in Minneapolis or St. Paul. Streets are named after the defendants, [they] have to take newly-developed products out of town to be tested; employees by the thousands, [the] largest employer in the City of St. Paul, so large [that] at one time when they finished second in the Community Chest fund they made the announcement they

would have to up it, it would never do for Three M's to be seeond in the contributions to the Community Chest. Busch Street and McKnight Circle [are] named after Defendant's officials. In this justice? Is this the justice that Mr. Chadwell has been so eloquently and fluently speaking about today? I know in this district both Mr. Chadwell and the Government will get a fair trial. I know the Government won't in Minneapolis or St. Paul.

I think the defendant has many reasons for seeking to have this case transfered. But I submit that the interest of justice does not call for transfer of this case. And I submit to the Court that the motion to transfer should be over-ruled.

Your Honor, I find that I had three documents which I identified in my argument that I didn't pass up. I think the Court should see these also.

The Court: Mr. Chadwell should have an opportunity to examine them.

[fol. 198] Mr. Chadwell: Your Honor, could we have a short recess?

The Court: Yes. I don't believe we are going to finish today. Are you going to go back to Chicago, or do you want to finish tomorrow?

Mr. Chadwell: Of course I intend to go back tonight.

The Court: We won't finish today and we have the other two motions that I said I would hear. I am going to decide this one first, however. If I decide this in your favor I don't suppose you will want me to pass on the other motions, do you?

Mr. Chadwell: I suggested to the Court it might be a considerable duplication, if your Honor would grant our motion, to spend time on the other two motions, and perhaps you would not wish to do so.

The Court: Let's take just a few minutes.

Mr. Chadwell: I would be glad to wait until later.

The Court: I think we are going to have to take one more hitch at this anyhow. Don't you think so, Mr. Jinkinson?

Mr. Jinkinson: Yes.

The Court: I think you would like to look at these documents.

Mr. Chadwell: I say I want a look at them without prejudice to my position. They've got nothing to do with this transfer motion, before I see them.

The Court: Anything else you wish to say in a short statement is all right.

Mr. Chadwell: No sir.

The Court: I am sure if they are not material the Court will pay no attention to them, in due course. However, it is going to take you a little time.

Mr. Chadwell: Yes, certainly.

The Court: It is after three o'clock now. I don't know how long you are going to speak to the motion. You have [fol. 199] also got some material to furnish the Court. I don't suppose you want to try the case up in Minneapolis or here either before the first of September, do you?

Mr. Jinkinson: No.

Mr. Chadwell: He wants an early trial, but not too early.

The Court: I don't see where it makes any difference whether we try to finish today or not. If we go ahead we will finish late. You gentlemen probably want to get back to Chicago.

Mr. Jinkinson: No. No.

The Court: Danville is your second home, isn't it?

Mr. Jinkinson: That's right. I would just as soon finish this tomorrow morning.

The Court: I am going to be gone tomorrow morning. I have already agreed to take some time tomorrow morning.

Mr. Chadwell: Any date your Honor suggests.

(Discussion between Court and counsel.)

The Court: Let's have it the 10th of July, at ten o'clock in the morning. All right.

Mr. Chadwell: I understand that the other motions will be argued that day too.

The Court: Yes, dispose of the whole thing. It shouldn't take long on those other motions.

(Thereupon, hearing on the motion was continued to ten o'clock A. M. on July 10th, A. D. 1962.)

[fol. 200]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

Criminal Action

No. 61-73-D
(15 U.S.C. §§ 1 and 2)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY, DEFENDANT.

ADDITIONAL AFFIDAVIT OF WILLIAM L. MCKNIGHT IN SUPPORT OF MOTION TO TRANSFER THIS ACTION TO DISTRICT OF MINNESOTA

STATE OF MINNESOTA)
) SS
COUNTY OF RAMSEY)

WILLIAM L. MCKNIGHT, being first duly sworn on oath deposes and says:

1. I executed an affidavit in this cause on February 21, 1962 in support of the aforesaid motion to transfer this cause to the District of Minnesota. I have read the transcript of the oral argument on the aforesaid motion held on June 14, 1962 and have seen the pictures of me submitted to the court by counsel for the prosecution.

2. Since my retirement as chief executive officer of the defendant in 1949, it has been my custom to spend the winter season in Florida where I have a winter residence, but St. Paul, Minnesota is my home and I spend most of my time there.

3. For the last ten years while in Florida, my personal physician has been Dr. David W. Exley whose offices are located at 1005-96th Street, Miami Beach, Florida. During this past winter Dr. Exley, under the direc-
[fol. 201] tion of Dr. Joseph Borg of St. Paul, supervised

an anticoagulant therapy program on which I had been placed by Dr. Borg. I had two consultations with Dr. Exley while I was in Miami Beach; and, in addition and subject to his supervision and instructions, technicans from St. Francis Hospital, Miami Beach, gave me bi-weekly injections of medicine in accordance with the therapy program. Although at less frequent intervals, the therapy program is being continued at the present time in St. Paul.

4. Attached hereto is a letter from Dr. Joseph Borg, my personal physician in St. Paul, which was written at my request following my scheduled consultation with him on August 7, 1962. I still experience difficulty in retaining food despite the gall bladder operation mentioned in my previous affidavit and it would, of course, be far easier for me to follow my diet at my home in St. Paul than it would be in commercial establishments in Danville.

/s/ William L. McKnight
WILLIAM L. MCKNIGHT

Subscribed and sworn to
before me this 16th day
of August 1962.

/s/ Phyllis J. McGinnis
Notary Public
Phyllis J. McGinnis,

Notary Public, Ramsey County, Minn.

My Commission Expires Sept. 8, 1965

[fol. 202]

ATTACHMENT TO ADDITIONAL AFFIDAVIT OF
WILLIAM L. McKNIGHT

DOCTORS BORG, CRAIG AND SWENSON
918 Lowry Medical Arts Building
SAINT PAUL 2, MINNESOTA

JOSEPH F. BORG
DAVID M. CRAIG
DONALD B. SWENSON

August 15, 1962

TO WHOM IT MAY CONCERN:

Mr. William L. McKnight has been a patient of mine over the past year. Prior to that he was a patient of Dr. William Hartfiel who is now Medical Director of Minnesota Mining and Manufacturing Company.

Mr. McKnight underwent surgery for removal of his gall gladder in Doctor's Hospital, New York, during March, 1961. Prior to the operation he suffered from a chronic digestive disturbance manifested particularly by difficulty in retaining his meals. Following the operation he sustained a weight loss of 23 pounds, following which he slowly got back to 140 pounds. He has not been able to increase his weight further over the past several months. The operation, while it brought about some improvement in this digestive problem, has by no means cured it and he continues to have much the same picture of digestive disturbance that he had pre-operatively. This digestive problem is definitely aggravated by nervous tension.

When I first saw Mr. McKnight he complained about some speech impediment and other related problems, for which it seemed wise to place him on anticoagulent therapy. This was started last year and requires periodic blood testing and clinical observation in its management. Recently he has been seen approximately once monthly for this purpose. During the past winter while he was

in Florida, Dr. David Exley of Miami Beach, his physician in that city, supervised the management of his anti-coagulant program under my direction. The tests made by Dr. Exley were reported to me on Mr. McKnight's return to St. Paul in May of this year.

It is my opinion that a long trial at Danville, Illinois, with the nervous strain involved, would be much more difficult for him than a trial where he could be at home and close to medical attention.

JOSEPH F. BORG
Joseph F. Borg, M.D.

[fol. 203]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ILLINOIS

Criminal Action
No. 61-73-D

15 U.S.C. §§ 1 and 2)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,
DEFENDANT.

ADDITIONAL AFFIDAVIT OF WILLIAM C. HUNT

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

WILLIAM C. HUNT, being first duly sworn, deposes and states as follows:

1. I executed a previous affidavit in this cause on March 7, 1962, in support of the motion of the defendant to transfer this cause to the District of Minnesota.

2. On August 1, 1962, I examined the records of the criminal cases pending before the United States District Court for the District of Minnesota, 1st, 2nd, 3rd and 6th Divisions, which records are maintained in the Office of the Clerk of Court at St. Paul, Minnesota.

3. On August 13, 1962, I made further inquiry as to the docket conditions for the aforesaid Divisions of the Court by speaking with Sam Hanson, Deputy Clerk responsible for maintaining the records for criminal cases in those Divisions. In addition, I spoke with Lawrence Tapper, Deputy Clerk of that Court responsible for maintaining the records pertaining to civil cases for those Divisions. The following information was obtained from a personal examination of the records and from speaking with the Deputy Clerks of Court:

Cases pending as of July 31, 1962	1st Div	2nd Div.	3rd Div.	6th Div.
Criminal	0	0	19	2
Civil	22	28	125	26

[fol. 204]

Total (1st, 2nd, 3rd and 6th Divisions):
Criminal 21
Civil 201

Total 1st, 2nd and 3rd Divisions only:*
Criminal 19
Civil 175

4. On August 1, 1962, I personally examined the records of criminal cases pending before the United States District Court for the District of Minnesota, 4th Division, which records are maintained in the office of the Clerk of Court at Minneapolis, Minnesota. In addition, I was advised by William Eckley, Deputy Clerk, as to the number of civil cases pending in the 4th Division as of July 31, 1962. The information I obtained was as follows:

Cases pending as of July 31, 1962	4th Div.
Criminal	37
Civil	277

/s/ William C. Hunt
WILLIAM C. HUNT

Subscribed and sworn to before me this 20th day of August, 1962. /s/ Ellen Thomas Notary Public Seal

* From personal experience in the conduct of litigation in the U. S. District Court for the District of Minnesota I have knowledge of the fact that papers required to be filed for 1st, 2nd, 3rd and 6th Division cases are to be filed in the Office of the Clerk at St. Paul, Minnesota. Furthermore, terms of court in the 1st and 2nd Divisions have been pretermitted by order of the court and cases for those Divisions are tried in the 3rd Division at St. Paul. Though papers required to be filed for 6th Division cases must be filed in St. Paul rather than at Fergus Falls, Minnesota, trials of such cases are actually tried at Fergus Falls, Minnesota, where is located the courthouse for 6th Division cases.

[fol. 205]

IN UNITED STATES DISTRICT COURT

August 17, 1962

Hon. Casper Platt
U.S. Courthouse
Danville, Illinois

Re: UNITED STATES v MINNESOTA MINING AND MANUFACTURING CO.—CR. No. 61-73-D

Dear Judge Platt:

In accordance with your request at the oral argument held on the Motion to Transfer this Cause to the District of Minnesota on June 14, 1962, I am enclosing herewith tables indicating the number of stockholders and employees of the defendant who live in the district of Minnesota. While the tables are pretty much self-explanatory, I should like to make a few comments on them.

The District of Minnesota is divided into six (6) Divisions, 28 U.S.C., Sec. 103; the court house for the third division is located in St. Paul while the court house for the fourth division is located in Minneapolis. The third division is made up of the counties of:

Chisago	Rice
Dakato	Scott
Goodhue	Washington
Ramsey	

The counties comprising the fourth division are:

Anoka	McLeod
Carver	Meeker
Chippewa	Renville
Hennepin	Sherburne
Isanti	Swift
Kandiyohi	Wright

We are informed that as a matter of practice, cases arising in the third and fourth divisions may be heard in either Minneapolis or St. Paul. Accordingly, Table 1 [fol. 206] shows a detailed breakdown of (1) population,

(2) stockholders of 3M, (3) employees of 3M, (4) employees of 3M who are also stockholders, and (5) the total number of 3M stockholders and employees who are not stockholders for each of the counties of the third and fourth divisions and for the remaining counties in the district taken as a whole. A further breakdown into villages or municipalities within these counties as requested by Mr. Jinkinson's letter of June 21, 1962 seemed unnecessary and would require substantial time and expense.

The 3M stockholders' list is made up from cards which contain the name or names and addresses of the shareholders on the certificates as issued by the Transfer Agents. Each card constitutes an account so that the total number of stockholders of 93,418 is actually 93,418 accounts. No allowance has been made for possible duplications which arise when a given stockholder uses a different name or address on the certificates. For example, a shareholder who has some shares in his own name and other shares in his name as guardian would be two accounts. Likewise some of the accounts may include more than one name. For example, if the certificate is issued to husband and wife as joint tenants this would be one account or one shareholder on the Company's records. Also as noted on Table 1, there are 1,732 broker or nominee accounts; the beneficial ownership of these shares in these accounts is unknown to the company. One Hundred and Forty-one (141) of such accounts which had Minnesota addresses were excluded from the tables.

The District Court, of course, has power to select jurors from the entire district "so as to be most favorable to an impartial trial." (28 USCA, Sec. 1865). Thus, for purposes of Mr. Jinkinson's argument, jurors could be selected from the entire district of Minnesota. Table 2 indicates that less than 1% of the population of the district of Minnesota is made up of 3M stockholders and non-stockholder employees.

[fol. 207] Since trial could be held in either St. Paul or Minneapolis, we have combined the totals for the third and fourth divisions in Table 3 which shows that less than 2% of the population of the combined district is made up of 3M stockholders and non-stockholder employees. . .

Table 4 shows that in the Third Division at St. Paul, only 3.21% of the population is comprised of 3M stockholders and non-stockholder employees while only 0.62% of the population of the fourth division is made up of such persons.

By general order of the District Court for the District of Minnesota dated February 27, 1961, the selection of jurors for the third division was limited to Ramsey County and the counties contiguous thereto except Hennepin while selection of fourth division jurors was limited to Hennepin County and the counties contiguous thereto except Ramsey.

We are informed that as a result of that order, jurors for the third division are, in practice, drawn from the counties of Dakato, Washington and Ramsey while jurors for the fourth division are drawn from the counties of Anoka, Carver, Wright and Hennepin.

Tables 6 and 7 reveal the percentage of 3M stockholders and non-stockholder employees in these counties of the third and fourth divisions and show in the third division 3.7% and in the fourth division.058%.

As a matter of interest, we have set forth in Table 8 the figures for the number of government employees compared with the number of 3M employees in the Minneapolis and St. Paul metropolitan area which is the only area for which such figures are presently available.

If there is any further information of this nature which you would like us to obtain, please let me know.

Yours very truly,

JOHN T. CHADWELL

JTC:mz
encls.
cc Mr. Earl A. Jinkinson

[fol. 208]

Attachment to Letter From John T. Chadwell to Hon. Casper Platt

TABLE I

DISTRIBUTION OF 3M STOCKHOLDERS, EMPLOYEES & EMPLOYEE-STOCKHOLDERS IN MINNESOTA, BY CERTAIN COUNTIES AND IN TOTAL

County	Population	Stockholders as of Feb. 28, 1962 (Column 1)	Employees as of June 30, 1962 - Total (Column 2)	Those also Stockholders (Column 3)	Total Stockholders & Non-Stockholder Employes (Column 4)*
Third Division					
Chisago	13,419	38	30	13	55
Dakota	78,303	1374	881	473	1782
Goodhue	33,035	61	21	7	75
Ramsey	422,525	14217	6462	3526	17153
Rice	38,988	56			56
Scott	21,909	45	6	3	48
Washington	52,432	1483	1092	546	2029
	660,611	17274	8492	4567	21198
Fourth Division					
Anoka	85,916	108	55	23	140
Carver	21,358	19	6	2	23
Chippewa	16,320	14	1		15
Hennepin	842,854	5044	696	315	5425
Isanti	13,530	5	2		7
Kandiyohi	29,987	23	14		37
McLeod	24,401	494	870	308	1056
Meeker	18,887	71	126	37	160
Renville	23,249	32	24	4	52
Sherburne	12,861	45	2		47
Swift	14,936	17			17
Wright	29,935	30	46	10	66
	1,134,234	5902	1842	699	7045
All other counties—	1,619,019	1957	275	121	2111
Total-Minnesota—	3,413,864	25,133	10,609	5,388	30,354
Total—3M		93,418	33,000 (approximately		

Note: Of a total of 1732 broker and nominee stockholder accounts throughout the United States, not included above, 141 bear Minnesota addresses.

*—Column (1) plus (2) minus (3)

Population figures taken from 1962 World Almanac based on 1960 census.

3M figures are from company records and do not include allowance for duplications resulting from different names or addresses for the same stockholders nor for joint tenancies or similar dual ownerships.

[fol. 209]

TABLE II—DISTRICT OF MINNESOTA

Population	3,413,864
3M Stockholders and Non-Stockholder Employees	30,354
Percentage	0.89%

TABLE III—COMBINED THIRD AND FOURTH DIVISIONS-DISTRICT OF MINNESOTA

Population	1,619,019
3M Stockholders and Non-Stockholder Employees	28,243
Percentage	1.74%

TABLE IV—THIRD DIVISION-DISTRICT OF MINNESOTA

Population	660,611
3M Stockholders and Non-Stockholder Employees	21,198
Percentage	3.21%

TABLE V—FOURTH DIVISION-DISTRICT OF MINNESOTA

Population	1,134,234
3M Stockholders and Non-Stockholder Employees	7,045
Percentage	0.62%

TABLE VI—THIRD DIVISION-DISTRICT OF MINNESOTA COUNTIES OF RAMSEY, DAKOTA AND WASHINGTON ONLY

Population	553,260
3M Stockholders and Non-Stockholder Employees	20,964
Percentage	3.7%

TABLE VII—FOURTH DIVISION-DISTRICT OF MINNESOTA COUNTIES OF HENNEPIN, ANOKA, CARVER AND WRIGHT ONLY

Population	980,063
3M Stockholders and Non-Stockholder Employees	5,654
Percentage	0.58%

TABLE VIII—MINNEAPOLIS-ST. PAUL METROPOLITAN AREA—COUNTIES OF HENNEPIN, RAMSEY, ANOKA, DAKOTA & WASHINGTON

Population	1,482,030
3M Employees	10,334
U. S. Government Employees	15,180

[fol. 210]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ILLINOIS

Criminal No. 61-73-D

UNITED STATES OF AMERICA,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY,
DEFENDANT

TRANSCRIPT OF PROCEEDINGS, AUGUST 21, 1962

Transcript of proceedings had in the above entitled cause on the 21st day of August, A. D. 1962, in the District Court of the United States, for the Eastern District of Illinois, at the United States Courthouse in the City of Danville, Illinois, before the Honorable Casper Platt, United States District Judge.

APPEARANCES:

For the United States of America: Messrs. Earl A. Jinkinson, Raymond P. Hernacki, Theodore T. Peck, Leon L. Lindenbaum, Howard L. Fink, Attorneys, Department of Justice, Room 404, U. S. Courthouse, Chicago, Illinois.

For the Defendant: Messrs. John T. Chadwell, Glenn W. McGee, Allen Reniche, John L. Connolly.

PROCEEDINGS.

The Court: Good morning. I believe we finished with the Government's argument.

Did you have something more, Mr. Jinkinson?

Mr. Jinkinson: Well, I did have something to say, with reference to these figures, but I thought I would say what I wanted to submit, I thought, perhaps after Mr. Chadwell was through.

The Court: Well, I think you could have rebuttal.

Mr. Chadwell: If you are talking about the letter we submitted to his Honor, with the attached tables.

[fol. 211] Mr. Jinkinson: Yes. Your Honor, and Mr. Chadwell—

The Court: All right. You may comment. You may go ahead.

Mr. Jinkinson: Well, there were two affidavits filed. I will direct my attention first to that.

The Court: Two affidavits?

Mr. Jinkinson: Yes, one by Mr. McKnight filed this morning.

Mr. Chadwell: Your Honor, I have given to Mr. Jinkinson but I have not yet actually filed an additional affidavit of Mr. McKnight and a Mr. Hunt. Now I haven't had an opportunity to comment on these yet. I take it your Honor prefers to have Mr. Jinkinson complete.

The Court: Yes. You will have an opportunity on rebuttal.

Mr. Jinkinson: I will appear on rebuttal to Mr. Chadwell.

The Court: Well, if he wishes to make a few remarks about it first he may.

Mr. Chadwell: No. I am perfectly willing to wait.

The Court: Go ahead.

Mr. Chadwell: I will hand it up to the Court.

Mr. Jinkinson: Your Honor has the letter?

The Court: Yes. I have it before me.

ARGUMENT BY MR. JINKINSON

Mr. Jinkinson: I am going to comment briefly on the McKnight affidavit. So far as the Government is concerned, it contradicts nothing the Government has heretofore stated. The only thing it adds as far as the Government is concerned is that Mr. McKnight has to follow a diet.

In regard to the Hunt affidavit, we don't think this contradicts anything that the Government has stated heretofore. The only thing it adds is the docket situation for the District of Minnesota as of the end of last month, as of July, 1962, using the figures listed by Mr. Hunt, we [fol. 212] find there are 58 criminal and 478 civil for an

average of 134 cases per judge. If this case is placed at the end of this caseload, as was stated to be the practice in the Fink affidavit, your Honor could get a pretty good idea of how long it would take to get this case to trial in Minnesota.

Now I want to add two thoughts with reference to the inability of the Government to get a fair trial in St. Paul. Those two things I want to call the Court's attention to, the fact that Minnesota Mining and its officers, employees contribute over a million dollars, well over a million dollars per year in that area to various charitable organizations, institutions of one kind or another. This I submit to the Court will have an effect on those people who are called to sit as jurors in this case.

The Court: Donations for what? What are you referring to? Donations to charitable causes?

Mr. Jinkinson: Charitable causes. I think they contribute—I think there is a foundation, your Honor, Minnesota Mining Foundation, which contributes I think substantially to research at the University of Minnesota, other institutions, as well as to the United Funds, and Y. M. C. A., and all these other various organizations in Minnesota. I am not saying that they shouldn't do this, your Honor, but I am saying this practice of course makes it very difficult for the Government to secure a fair and impartial trial in this area.

In addition to this the officers and directors of Minnesota serve in the following local organizations: Empire Bank of St. Paul, St. Paul Commission on Industrial Relations, St. Paul Association of Commerce, St. Paul Civic Opera Association, First Trust Company, Eastern Heights State Bank of St. Paul, Minnesota Historical Society, Great Northern Railway Company, St. Paul Athletic Club, Promoter of Pedestrian & Transportation Safety Programs, Northwestern Bell Telephone Company, First [fol. 213] Trust Company of St. Paul, First National Bank of Minneapolis, Ramsey County Tuberculosis & Health Association, Indian Council, Boy Scouts of America, St. Paul; St. Paul Y. M. C. A., Advisory Council, National Business Aircraft Association, Inc., 1955; Governor's Council On Unemployment, Board of Trustees, Ham-

line Universities; St. Paul City Plumbing Board, Minnesota Community Research Council—

The Court: The St. Paul Plumbing Board?

Mr. Jinkinson: Yes, whatever that means, your Honor, and the Minnesota Community Research Council, Greater St. Paul United Fund & Council, Inc.; Minneapolis Society of Fine Arts, St. Paul School Board, Trustee, Breck School; Board of Trustees, Macalester College; Board of Trustees, St. Luke's Hospital; Minnesota Orchestral Association, A. R. C. Community Chest, Governor's Advisory Commission, Employment of Handicapped; St. Paul Mental Health Association, Governor's Advisory Commission, Vocational Rehabilitation; Board of Directors, St. Paul Chapter, American Red Cross.

The Court: How long has Minnesota Mining been located in St. Paul, in the vicinity of St. Paul? When did they move there?

Mr. Jinkinson: I think they started there, your Honor.

The Court: I thought they started around Duluth?

Mr. Chadwell: That is correct.

Mr. Jinkinson: Where?

Mr. Chadwell: Around Duluth.

Mr. Jinkinson: How long ago I think Counsel could answer.

Mr. Connelly: 1915.

Mr. Chadwell: When did Minnesota Mining establish its office in St. Paul?

Mr. Connelly: Around 1911.

Mr. Jinkinso: About 1911, your Honor. In addition [fol. 214] to serving on these committees and being directors of banks, ["are also" deleted] members of the personnel of Minnesota are presidents of some of these organizations.

Now, your Honor, I want to direct the Court's attention to Mr. Chadwell's letter of August 17th, and I want now —we have this. I am going to take an example. Mr. Chadwell's letter listed a number of cases in the third [and] fourth divisions of the District of Minnesota. I am going to take, for example, he lists in Ramsey County, in the third division, four hundred twenty-two thousand, five hundred and twenty-five as the population. Now this

includes women and children, people under twenty-one years of age. Going to the census bureau we find that there are not four hundred twenty-two thousand five hundred and twenty-five people eligible for jury service. There are only two hundred fifty thousand sixteen. Now, assuming that there are two adults to every family, I think this is—

The Court: Ramsey County, that is St. Paul?

Mr. Jinkinson: St. Paul. That's right.

Assume there are two persons to every family, which of course is a—we think that is really being charitable, because there are a number of families which have some adults living in the home, but we will just say there are two. Divide the two hundred fifty thousand sixteen adults in Ramsey County, you get a hundred twenty-five thousand sixteen persons, I mean sixteen family groups. It would, of course, be unusual to have a man and his wife, and or a man and his son, or anybody else serving on the same jury. Now we find, according to Mr. Chadwell's letter, a table which says there are 17,153 stockholders and non-stockholder employees in Ramsey County. Now this roughly figures out to be one out of every six and a half persons in Ramsey County is either a stockholder or an employee of Minnesota Mining. Now I think the Court [fol. 215] would not operate in a vacuum. The Court knows that these 17,153 persons do not form an exclusive club and are not associated with anyone working—I mean everybody has got a friend, maybe one, maybe two, and a person of course who is an extrovert may have dozens of friends, so I'm just trying to demonstrate to the Court the narrow population when you analyze it this way in Ramsey County. Of course you have these 17,153 persons covered on that population of that county. And that is where they are asking this case to be transferred, to St. Paul. But let's take, as Mr. Fink said, let's play in their ball park. In both divisions, according to Table 2, that is the Third and Fourth Division—or Table 3. We will take Table 3. There is a total of 1,619,019 persons in both the Third and Fourth Divisions. That is Minneapolis and St. Paul. When you reduce this to adults you are going to get roughly 950,000 adults. Now when you reduce this fur-

ther to two persons in a family you are going to get 375,000, about roughly—about 425,000, maybe 475,000. Now you've got 28,243 stockholders and non-stockholder employees sprinkled among these 475,000 adults, sprinkled in the Third and Fourth Divisions. If you want to take all the counties which make up the Third Division, which is St. Paul, you are going to get 660,611 total population. Reducing that on a percentage basis to adults you are going to get 375,000 adults. If you want to reduce that further to family you are going to get 175,000 family groups. You have 21,000 employees that are sprinkled throughout the Third Division, so I say to the Court that in the interest of justice, because after all, Judge Will decided a case the other day in Chicago, deciding to transfer a case back to Milwaukee, not back, just to Milwaukee, but of course pending there was a criminal case that the Government had filed in Milwaukee, and he rather balanced those factors, the inconvenience of the [fol. 216] witnesses and the inconvenience of the transportation, and he said that both balance out so far as he is concerned. He said the reason why he was transferring it back, or transferring it to Milwaukee, was because there was a pending criminal case. It had been filed first and the Court there would be familiar with that case and it was in the interest of justice and it would speed up the trial of the case to have one judge to handle both cases. The point I am making of course, transfer turned on the interest of justice. And I say to this Court now, and I reiterate what I said before, that the Government has interest in this case. It has a right to a fair and impartial trial, and the Government alleges and maintains that it cannot get that fair and impartial trial in either the Third or Fourth Division of the District of Minnesota.

Mr. Chadwell: Your Honor, I take it that Mr. Jinkinson agrees that the letter which I wrote to your Honor under date of August 17, 1962, to which he has referred, that the tables included therein may be received as accurate to the same extent as if it were an affidavit. I assume that is the case, so that it is part of the record in this case.

Mr. Jinkinson: Well, I have no objection to it. I just assume they are accurate, Mr. Chadwell.

Mr. Chadwell: Well, I think I am entitled to have you state you aren't going to require me to put this in the form of an affidavit, because if you are I will do so.

The Court: Well, who signed it, Mr. Chadwell?

Mr. Chadwell: I signed it, and it is true and correct, according to the information given to me by the corporation.

The Court: I see.

Mr. Jinkinson: That's all right. I have no objection.

ARGUMENT BY MR. CHADWELL

Mr. Chadwell: Your Honor, I want to deal with these [fol. 217] two points Mr. Jinkinson has emphasized in his arguments, in June, and re-emphasized today.

Now, first, the question as to whether the Government can secure a fair trial in Minnesota, and second, the comments he's had to make about Mr. McKnight. These are, I think, the two principal arguments which he has made, and the two principal arguments that I would like to deal with on my rebuttal.

Before doing so, I would like to make this point. And that is that Mr. Jinkinson and other counsel for the Government have not answered or attempted to answer the basic proposition which we have submitted to the Court, and upon which we primarily rely here, and that is that the trial of a defendant in a criminal case in the home district of the defendant is a matter of constitutional concern which should be respected in the absence of compelling necessity to the contrary. Now that rule, your Honor, as I argued to the Court and as our brief showed has been followed by the Federal courts again and again in these Rule 21-B motions, and as I stated to the Court in my argument in June, there has not been a single case since the adoption of Rule 21-B where a Court has refused to transfer a criminal case under Rule 21-B, to the home district of the defendant where the defendant making the motion was the sole defendant in the case. There hasn't been a single case of that kind, and on the contrary I cited to the Court, in our briefs, and in my oral argument the General Motors case, the American

Natural Gas case, the Allied Van Lines case, and the White case, the National City Lines case; and I submit to the Court that the showing which we made in our affidavits and the facts in this case compel, as we see it, a transfer of this case to the home district of the defendant are as strong here or stronger than in the cases which I cited in the Court and upon which we strongly rely as precedent in this case.

[fol. 218] Now, Mr. Jinkinson in his answer, and Mr. Hernacki, in their answer have talked about everything except this basic proposition. Mr. Jinkinson has said there has never been a case where a court has been reversed in refusing to transfer a criminal case. I say that consideration I am sure will make no difference to this Court, who I know wants to decide this on the matter of fairness and in the interests of justice. I do say this, however, for what it is worth. One reason there's never been a court reversed in a situation of this kind is because no court ever held what Mr. Jinkinson is requesting this Court to hold, namely, the home district of the defendant should not be the place of trial, in spite of all circumstances, the interests of justice warrant a trial in the home district.

Now, let me deal with these two points upon which Mr. Jinkinson has relied so much, and I would like to deal with them one at a time.

The first point is this question of whether the Government could secure a fair trial in Minnesota. Now, in the first place, the Court would perhaps be interested in knowing that Minnesota Mining has had a little experience with litigation in Minnesota, and the experience that they have had does not bear out the statements made by Mr. Jinkinson as to the inability of their opponents to get a fair trial. The first case that I want to refer to is Minnesota Mining against the Ditto Corporation which Judge Nordbye decided in March, 1962 against Minnesota Mining. That was a patent infringement case. Judge Nordbye held against the defendant, Minnesota Mining, and a decree of dismissal was issued by the court in July of 1962. Another case to which I wish to refer is the Hoehn case against Minnesota Mining which was tried before a jury

in the United States District—in the state court, in St. Paul, and according to newspaper accounts of the case, [fol. 219] which I have here, the fact is that the verdict handed down—it was a personal injury case—the verdict handed down against the defendant in this case was one of the largest on record. It was $185,000.00. This was in 1953. The court reduced the verdict to $104,000.00, and it was affirmed by the Supreme Court of Minnesota. The fact of the matter is that the Government's argument on this question ignores the competence and judicial fairness of the judiciary in Minnesota. It ignores the proven tools established by the Congress, statutory tools for insuring a fair jury trial under any set of circumstances that can arise. And let me illustrate that for a moment.

Under the Criminal Rules, the qualifications for a juror are they must be twenty-one years old; they must reside in the district and must be—must not be suffering from physical or mental infirmity. Now, the court has very broad powers, as your Honor knows better than I, to insure the selection of jurors who will be—who will not be prejudiced. As a matter of fact, the court has the right to disqualify any classes of jurors that he thinks should be disqualified. That is provided in Section 1863-b of the Judicial Code. It gives the court the right to excuse from jury service or exclude from jury service any class or group of persons, and as a matter of fact, under that provision, in the Caudle case, in St. Louis, that was a criminal action your Honor will recall against a former Assistant Attorney General and others involving an alleged fraud on the Government,—the Court, because of the claim that it was impossible to secure a fair trial in St. Louis, where there had been so much publicity about this matter, the court entered an order excluding from jury service all residents of St. Louis—excluded all residents from St. Louis from the jury panel on the court's own motion, under this Rule I just read to your Honor. That is in *Connelly* v. *U. S.*, 249 Federal 2nd 576.

[fol. 220] Furthermore, of course the Government could challenge for cause every stockholder or employee of Minnesota Mining. There can't be any question about that. That is a well-established right.

The Court: I don't think any court would let any employee or stockholder sit on the jury.

Mr. Chadwell: Certainly he would not.

The Court: It wouldn't take a challenge for cause.

Mr. Chadwell: There is no question about it. Now then, that being the case, the significance of these figures, or the arguments made by Mr. Jenkinson are shown up in their true light I respectfully submit.

Let me deal with these figures, your Honor, which I have submitted to the Court and which are from the records of the company, and I am referring to the two tables which are enclosed in my letter to your Honor of August 17th, 1962. As your Honor will observe, from the second table which deals in percentages, perhaps it is a little easier to read, although either one of these makes no difference. The large concentration of stockholders—the largest concentration of stockholders and non-stockholder employees is in Ramsey County, which your Honor will observe is St. Paul, and the second largest is in Hennepin County, which is Minneapolis. Now the Court has a right not only to exclude, if the Court feels it should do so, not only to exclude stockholders and employees, which the Court undoubtedly would do, but also if there is anything to this sympathetic point that Mr. Jinkinson has made, the Court could also exclude if it desired to do so, the residents of St. Paul, all the residents of Hennepin County, and draw the jury entirely from the rest of the District. Indeed, that provision is expressly set forth in the statute so that the Court has a right to draw the jury from any area in the district which the ends of justice might dictate. He does have that right. I don't know [fol. 221] whether your Honor has had occasion to do that here. He has a right to do so. They also have the right to do so in Minnesota. If the number of stockholder and non-stockholder employees in Ramsey County are excluded from this list, the percentage of employees there or non-stockholder employees and stockholders located in the other areas in Minnesota come down to miniscule proportions of no significance whatsoever. Now, so far as Ramsey County and Hennepin County are concerned, even there, as your Honor will observe, the percentages there

are down to something in the neighborhood of three percent. Now it is true that the total population on which these percentages are calculated includes children. The stockholders also include children. We didn't break that down. I don't know how many there are. The fact of the matter is, though, as your Honor knows, that is a very ordinary thing for families to do, to put stock in the name of their children. There are no doubt a great many here. I don't know that we have the means of determining that, but whether it is or whether it isn't so, it seems to me that the fact of exclusion from the jury of stockholders of the company will adequately safeguard that right. Any question that might arise as to the impartiality of a jury that might be drawn even from the residents of St. Paul. Now if your Honor please, the fact is that your Honor will observe it is true that the total population includes husband[s] and wives. Mr. Jinkinson makes that argument but of course the question is not who could be called. The question is who probably will be called.

Now it is most unusual, I've never known it to happen as a matter of fact, in my experience where both a husband and wife were called on a jury panel. Perhaps it could happen, perhaps sometimes it does happen, but for purposes of determining the percentage and the probability of non-stockholders and non-employees being called, [fol. 222] the entire population as far as husbands and wives are concerned must be considered, because both of them obviously, or both of them might be called, so the percentages in that connection should not be reduced or in any way affected by the fact that there are several families included, obviously, in the population figures.

Now, your Honor, Mr. Jinkinson has quoted from what he says, and which I have no doubt is a transcript of the portion of the testimony of Mr. Hatch. Your Honor will recall, on Page 100, I believe it is, of the record, Mr. Jinkinson referred to testimony given by a vice-president of Minnesota Mining.

The Court: What page?

Mr. Chadwell: Your Honor, Page 100 to 101 of the transcript. Mr. Jinkinson referred to the testimony of Mr. Hatch, a vice-president in charge of the New Prod-

ucts of Minnesota Mining in which Mr. Hatch made some comments to the effect that he doesn't feel that he could get —that he didn't feel he could get a fair test of the Jewett plate in St. Paul, and therefore they decided they would have to take it out of the city, out of St. Paul, and into Chicago to have a fair and impartial test. Well, the fact of the matter is, your Honor, that this Jewett plate is a printing plate. It is not consumer goods. It isn't like this scotch tape or anything like that that goes into the household. That is pressure sensitive tape. It is a press— it's a printing plate, and the things Mr. Hatch here was talking about, he was not talking about the general public or general consumer reaction, but he was talking about the reaction of printers in St. Paul. I might say, furthermore, that there is no doubt other parts of Mr. Hatch's testimony which makes clear what I have just said, that he was not talking about a consumer product at all, but a product available only—or sold only to printers or to jobbers for resale to printers, and I think since Mr. [fol. 223] Jinkinson has seen fit to read from this portion of Mr. Hatch's testimony, that if there is any point here at all, that one of the things is of any significance, in spite of what I have just said, we should be entitled to see the rest of Mr. Hatch's testimony in accordance with the decisions of the Courts in such matters. I don't press the point at this time, your Honor, because I feel that the statement made by this gentleman as to the effect of this particulaer test in the printing trade is of no significance whatsoever here. As a matter of fact, as your Honor, I'm sure—your Honor, I am sure knows better that I if the Government wishes the Court to put questions to the jury, or if the practice in St. Paul is for the counsel to ask questions of the jury, in either event the question could be raised as to whether the prospective juror had had any business dealings with Minnesota Mining, and in the event any were had which it would appear were in any way prejudicial against the Government, that juror could of course be excused for cause. I say to the Court that if the Government's contentions here with respect to the possibility that a trial in Minnesota would not be fair to the Government, if there were anything to that, it would

make it impossible for any case to be transferred to a district of the home office of the defendant unless the home office is in New York City, let us say, or Chicago, or some very large city, upon the ground that the Government might not secure a fair trial. Well now that simply is not the law. No court has ever held that the fact that the statutes have provided these safeguards for a fair trial in a jury case, to which I have reference, negative the need for any such thing as that, and as a matter of fact in the number of cases where the question has been raised as to the right of one party in a case to have a change of venue from a district where one party was exceedingly well-known or well respected, those cases all show there is [fol. 224] nothing to this point whatsoever. A number of decisions have held that such a motion for change of venue will not lie, that the Court has the right to safeguard the fairness of the jury panel under the statute and the mere showing that a bank, for example, has a large number of depositors will not justify the conclusion that the opponent in a suit against the bank can't secure a fair trial. That is a Kentucky case, on a motion for change of venue. There have been similar decisions in other cases in New York, Nonnan against Luther, 112 New York Supplement 898, where a court held on a motion for change of venue on the same ground, in a small area in New York:

> "The record discloses no facts," the court said, "to invoke the exercise of any discretion on the part of the special term. It shows an extensive acquaintance by the defendant, and business and political prominence and activity on his part and also professional and political prominence of his attorneys. These facts are insufficient to justify the order."

I say the to the Court that the argument made by Mr. Jinkinson on this point is so completely at variance with the power of the Federal Judiciary to safeguard the fairness of the selection of the jury, the principal provisions of which I have cited to the Court, that it is not worth an instant's consideration. I wish also to call to the Court's attention and discuss for a moment or two the McKnight

affidavit to which Mr. Jinkinson has referred a number of times and again this morning. Oh, I want to—before I do so, if I may, I would like to make reference to an argument that Mr. Jinkinson has made this morning, about charitable contributions made by either Minnesota Mining or officers of Minnesota Mining. I am not clear where he got his figures. I think he said Minnesota Mining and its officers had contributed a million dollars a year. I don't know where that comes from. I'm sure I don't have any such figures. I have just asked Mr. Con- [fol. 225] nelly, General Counsel of the Company, if he knows of any such figures and he says he doesn't know. Mr. Jinkinson hasn't made it clear what he is talking about. In any event, it is not unusual for company officers in any area to make contributions—

The Court: And employees?

Mr. Chadwell: Beg pardon?

The Court: Officers and employees.

Mr. Chadwell: Officers and employees and all the way down the line and they do it all the time, and of course, as your Honor knows, the contributions of employees with small income are sometimes more of a sacrifice to them than they are for the company and the officers, but that sort of thing is done all the time. Why it can't be for a moment argued in a court of law, it seem to me, that the mere fact a corporation or that individuals connected with a corporation make charitable contributions could be said to be a ground for making a motion for a change of venue, or for resisting a Rule 21-B motion. If so, everyone of these motions would be decided on side issues. We would be running down blind alleys. We would be arguing these motions on everything, on every issue except the issue that the Supreme Court had said in a case of this kind is the controlling issue and that is the issue as to whether or not there is a compelling reason for holding a trial of this kind in the district other than the home district of the defendant.

I might say to the Court that while I agree, I agree that this should be held in an area where both sides can have a fair trial, I don't say the defendant has a monopoly on the right to fairness at all; but I say that the reason why,

the basic reason why it is not fair to hold this trial in Danville, is as stated by Judge Tehan in the Gas case, with the holding by Judge Sugarman in the General Motors case. You have here a long complex trial. You have [fol. 226] here a case where thirty-eight different lawsuits filed by this company are at issue, and the question is were those cases filed in good faith or not. That means an exhaustive defense as to why we did what we did in all of these cases. There also is an issue in this case, as Mr. Hernacki's summary of the case shows, the case from his standpoint shows thirty years, thirty years of business activity of this company, going clear back into the early thirties, where they are attacking as a continuing conspiracy for illegal violation of the anti-trust laws the patent activities of this company, the licensing policies of this company, the activities of these companies in three different important divisions of its business, the important tape business, the Magnetic Media Division and the Plate Division.

Now, your Honor, I know from experience that when you've got a complex situation like this case, going to take months to try, you simply can't defend a situation like this unless you've got constant access not only to the records but to a large number of officers and employees of this company who might have to be called on at anytime to furnish information, and who have got to be available not only during the trial, throughout the trial, but of course for a period before the trial. There can't be any question, it seems to me your Honor, as Judge Tehan determined in the Gas case, where you've got that kind of situation, which was of the greatest importance, where the Government is making the charges they are here which go to the very heart of the operations of this company for many years, there can't be any question that just to try this case in Danville would impose a very severe hardship and make it exceedingly difficult, if not impossible, for counsel for the defense to do the job they want to in fairness to the defendant in defending this lawsuit. I say that that basic consideration which is, as Justice Frankfurter said, a matter of constitutional concern, lies [fol. 227] at the root of this motion that we are making

and that it is the basic issue upon which this motion should be decided, and these side trails, this rabbit warren that the Government is trying to run through in every direction except the right direction, should not bear a penny-weight in answer to the basic argument which we make here.

Now, your Honor, just a word about the affidavit of Mr. McKnight. I might say to the Court, to start out with, while I consider this is an important point—a point that we should advance, your Honor, will recall that in the argument which I made to the Court last June, I didn't mention this McKnight situation at all because I preferred to rest our case upon the argument which I have just recently made to the Court, which we made elaborately in our briefs, as to the fairness of the trial to the defendants in Danville, as ["to" deleted] compared to St. Paul, or to Minnesota. Now the fact of the matter is,—let me recite for the Court, though, what Mr. McKnight said in his first affidavit, and what Mr. McKnight said in his second affidavit after these interesting pictures were offered by Mr. Jinkinson at the last session. In the first place, what Mr. McKnight said in his first affidavit is on Pages 4 and 5 of his affidavit, and I want to just summarize it first, and then I want to show how they are supplemented in what Mr. McKnight's position [sic] [physician] says this time and what Mr. McKnight himself said this time. Mr. McKnight said he executed an affidavit in this cause on February 21, in support of the motion to transfer this case to the District of Minnesota. I have read the transcript of the oral argument on the motion held on June 14, 1962, and have seen the pictures, and he says that since retirement it has been his custom to spend the winter season in Florida where he has a winter residence, but that St. Paul, Minnesota is his home, and he spends most of his time there; and that for the last ten years while in Florida his personal physicial has been Dr. [fol. 228] David W. Exley. He gives his name and office address. During this past winter, Dr. Exley, under the direction of Dr. Joseph Borg, of St. Paul, supervised an anti-coagulant therapy program on which I [sic] [he] had been placed by Dr. Borg. I [sic] [he] had two consulta-

tions with Dr. Exley while I [sic] [he] was in Miami Beach, and in addition and subject to his supervision and instructions technicians from St. Francis Hospital gave him bi-weekly injections of medicine in accordance with the therapy program. Although at less frequent intervals the therapy program is being continued at the present time in St. Paul.

Then he attaches a letter from Dr. Borg which was written at his request showing the scheduled consultations with him on August 7, 1962. He says: "I still experience difficulty in retaining food despite the gall bladder operation mentioned in my previous affidavit and it would of course be far easier for me to follow my diet in my home in St. Paul than it would be in commercial establishments in Danville."

And I might say in the first affidavit filed by Mr. McKnight you will observe that much the same was said, his home is in St. Paul. "I will be seventy-five years old in November" and his personal physician is Dr. Borg. "My presence at the trial situs for extended periods of time required in this case will necessarily work a hardship on me in view of my age and physical condition, but this hardship will be greatly minimized if the trial is held at St. Paul, Minnesota rather than Danville, Illinois. Living at home in surroundings with which I am familiar and where I have ready access to my physician in whom I have great confidence would enable me to rest much better and work much more efficiently and with less physicial strain than would be possible living in a hotel in Danville, and working under less convenient conditions. In St. Paul, my files to which reference may have to be [fol. 229] made will be readily available at my office, my secretary who is familiar with them lives in St. Paul, and will also be available which would greatly relieve the mental and physicial strain on me in assisting in the defense of this case, as against a trial at Danville."

Your Honor will observe the statement of Dr. Borg, who states that Mr. McKnight underwent surgery for removal of his gall bladder in March of 1961. Prior to the operation he had suffered from a chronic digestive disturbance manifested particularly by difficulty in retaining his

meals. Following the operation he sustained a weight loss of twenty-three pounds, following which he slowly got back to one hundred forty pounds. He has not been able to increase his weight further over the past several months. The operation, while it brought about some improvement in this digestive problem, has by no means cured it, and he continues to have much the same picture of digestive disturbance that he had preoperatively. This digestive problem is definitely aggravated by nervous tension.

"When I first saw Mr. McKnight he complained about some speech impediment and other related problems for which it seemed wise to place him on anti-coagulant therapy. This was started last year and requires periodic blood-testing and clinical observation in its management."

And so on. During the past winter while he was in Florida, Dr. Exley supervised the management of his anti-coagulant program. Under his supervision, and he states it is his opinion that a long trial in Danville, Illinois with the nervous strain involved would be much more difficult for him than a trial at home, and close to medical attention. I say to the Court you can't ignore that.

The Court: That is an opinion, so far as this affidavit is concerned. I expect that this gentleman is going to have to undergo a mental strain whether he is at Danville, or St. Paul, and that is the bad feature.

[fol. 230] Mr. Chadwell: Yes sir. No doubt about that, but there is no question I think, your Honor, that the consequences would be far less serious in St. Paul, where he is home and where he can get this diet than it would be here. I don't think there is any question about that. That is what we said at the beginning, and that is what we still say. I say to the Court that the fact of the mater is that is only one of a number of points we have argued to the Court, and is by no means, as I say, the basic argument which we make, which I have tried to outline very briefly in what I said earlier this morning. The basic argument is far more important than that, and irrespective of Mr. McKnight, warrants granting of this motion we strongly urge to the Court.

I might say Mr. Jinkinson has made some broad statements in his affidavit about the fact that in his opinion

trial in Danville would be much more convenient to the Government, and its witnesses, than a trial in the District of Minnesota. It is in Mr. Jinkinson's affidavit he said that. Well, I can counter that by saying in my opinion that a trial in Minnesota will be far more convenient to the defendant and to the Government and to the Government's witnesses than trial in the District of—Eastern District of Illinois. You can't decide these things on statements made by counsel unsupported by the facts. Mr. Jinkinson is entitled to his opinion, but I might say to the Court that what Mr. Jinkinson did here is exactly what he did in the American Linen Supply case which was commented upon by Judge Grubb when he granted the motion to transfer in the American Linen Supply case, and I think it might be of some interest to the Court if I called the Court's attention to what Judge Grubb said about an affidavit of this kind, and I now refer, if your Honor please to the American Linen Supply case, U. S. against American Linen Supply, 134 Federal Supplement, at Page 21, and I am quoting in part from Pages 23 to 26. Now [fol. 231] in that case he pointed—Judge Grubb pointed out that Mr. Jinkinson made some general observations of this kind in his affidavit, hiding behind his expression of opinion, but that he had—he failed to list by name or by location a single witness that he was going to call. Judge Grubb said:

> "There is nothing in his affidavit setting forth the number or location of witnesses which the Government intends to call on the trial of these actions. He goes into detail as to airline and train schedules for traveling to Milwaukee."

He goes into detail on other matters, says Judge Grubb, but he does not say anything about that.

> "It would thus appear to the Court in the absence of Mr. Jinkinson's assertion to the contrary that it would be more convenient for the Government if the case were tried in Chicago. It would certainly be less expensive than bringing four or five people from the Chicago office to Milwaukee and maintaining them here. However, the Court cannot question Mr. Jink-

inson's assertion that it would be more convenient to have the cases in Milwaukee, and therefore, will accept that assertion as made regardless of how illogical it would seem, and regardless of the lack of facts to support that conclusion."

But the Judge then analyzed what the facts were which we have outlined to the Court here, the un-contested facts. The fact of the matter is, your Honor, so far as these alleged co-conspirators are concerned, all of whom, or representatives of whom were called before the grand jury, not a one of them is in the Eastern District of Illinois. As to the alleged co-conspirators in the tax aspect of this case, they are all out in the East, as to the alleged co-conspirators on the Magnetic media aspect of this case, they are in Chicago. As to the alleged co-conspirators in [fol. 232] the Plate aspect of the case, they have not given us any information, but they haven't come forth with anything to show that the facts that we've got in the record in our case, as shown by Mr. McGee's affidavit, as to witnesses called before the grand jury, information that we have secured as to the location of these alleged co-conspirators, information that we have secured as to witnesses called before the grand jury—in fact, outside of the co-conspirators which are listed in Mr. McGee's affidavit, show beyond any doubt that it is far more accessible for these witnesses whom we believe will be Government witnesses, to go to St. Paul, than to go to Chicago and change and come down to Danville, because they can go directly to St. Paul much easier than they can change and come down to Danville. That is all unsupported in the record, your Honor. I say all Mr. Jinkinson has to say by way of general conclusions in his affidavit, unsupported by any facts with respect to the location of these witnesses, why it is he has the feeling he has in his affidavit. I say that those facts should stand up, are in fact uncontested, in spite of the general conclusions Mr. Jinkinson has referred to, and upon which he seems to stand.

Now, he says this: "While affiant will not reveal their home locations he will state that a substantial number of the Government's witnesses live within a three hundred mile radius of Danville". That would of course include

Chicago. We have shown it is more accessible to the witnesses from Chicago to go to St. Paul than it is from Chicago to Danville by reason of the number of planes and trains that travel back and forth every day. There is no question about that. We have shown by the schedules and affidavits in this case. He ignores completely what we've had to say about the witnesses who live out East, both Government and Defense. Of course, obviously it is easier for them to go to St. Paul, as we have shown by our affi- [fol. 233] davit where they won't have to change, or to Minneapolis, than it is to come to Danville.

Now Mr. Jinkinson in his argument sought to put me in the position of claiming that Danville is sort of a backwoods community and all that. Your Honor would know I have no such notion. I went to the University of Illinois too long and have been a down-stater too long to have any such idea as that, but we do say the facts are the facts as to convenience of the witnesses, and the record shows beyond any question I respectfully submit that our proof on that is correct, but I say again that the rule of law upon which we stand firmly here is that I mentioned at the outset, the one based upon the importance of having the trial at the home district of the Defendant in the absence of compelling circumstances to the contrary, compelling circumstances to the contrary. That is the law here, and I say that these general conclusions of Mr. Jinkinson's affidavit and these side issues that he's dragged in to try to escape this basic constitutional matter are not worthy of any consideration at all when the two are balanced out, and I respectfully urge and insist that the motion which we have made here, if your Honor please, should prevail and should be granted.

Now I just want to make one more comment. That is that in the course of Mr. Jinkinson's argument and the course of Mr. Hernacki's argument to your Honor, a mention was made of some few exhibits which they argued show venue or some relationship between this case and this district. The first reference that was made deals with the suit against the C. K. Williams Company in East St. Louis. That was a patent suit filed, not by Minnesota Mining, but by Armour against Williams Company. Min-

nesota Mining was impleaded by Williams. It was in this district. It was one of the thirty-eight patent cases which will be at issue here. It was tried before Judge Juergens. [fol. 234] I should say that in that case the defense argued that the—that Minnesota Mining had been guilty of anti-trust violations and misuse of patents. In that connection, Judge Juergens held to the contrary, while he held that the—held against the validity and infringement of the patent he did hold that there was no anti-trust violation or misuse of the patents on the part of Minnesota Mining, contrary to the arguments made by the Williams Company. Now I say that, not because I believe that the Court will either here or any where else, will be bound by what Judge Juergens decided. I don't argue that at all. I just say that because so much was made by the other side of some of these other decisions. It seems to me that all these decisions are a matter of the merits of the case and the Court cannot obviously deal with the merits of the case on this motion. This is one case out of thirty-eight, one case out of thirty-eight that will be in issue in this lawsuit in the Eastern District of Illinois. There are other areas. Now the same thing is true with respect to tape. The tape aspect of this case—they have shown some three or four exhibits. Mr. Jinkinson ended up the last time showing some sales of tape in the Eastern District of Illinois. Well, there is no doubt, your Honor, that if he has venue here he will be able to show venue connections or some connections between this district and this lawsuit, but that is no answer to whether or not this Court should grant the motion filed under Rule 21-B, because Rule 21-B assumes before it becomes operative that there is venue evidence connecting the court where the suit was filed with the litigation as well as the court to which transfer is requested, and in this case of course there can be no question. It has been conceded by the Government that venue would lie in Minnesota as well as in Danville, so whether or not they have some evidence connecting this case with Danville is totally beside the point, and is of no significance and should not be con- [fol. 235] sidered, we respectfully submit to the Court, as any kind of an answer at all to the basic arguments which we have made here.

Of course, I am not going to refer to the argument made by Mr. Hernacki except in two respects. The first is of course that he gave the Court a summary or a general dissertation on the Government's theory of the case. This is not the time to argue the merits of the case, and as your Honor suggested, and I believe as I observed in my argument, this whole discussion by Mr. Hernacki ignored the presumption of innocence which stays with the defendant through this case, including this motion for transfer. It is unnecessary for me to elaborate on that. I might mention incidentally, also, that what Mr. Hernacki had to say, emphasized, it seems to me, the ancient character of much of this evidence, and does show the importance of our having available these records and these people who can give information on what has happened here clear back to the beginning of their evidence, which ["will" deleted] apparently will extend back for more than thirty years.

If your Honor please, I think I have gone as far as I need to go on this motion at this time in response to what the Government has said. I am sorry. I find one more thing which perhaps I should mention. The Government handed up to the Court in addition to the venue exhibits to which I referred, some documents which your Honor was good enough to permit us to withdraw for checking. Apparently these documents were offered to the Court for the purpose of showing that we have filed lawsuits around in various sections of the country, and the Government claims that we were guilty of forum shopping, therefore, and I suppose that their contention is that these documents show that. In the first place, the documents do not show it. The documents show that the Defendant gave consideration to areas where suits ought to be filed which was [fol. 236] not unusual. We are not claiming that the Government is forum shopping here. I have never said that to the Government or to the Court. I am not saying that. They have decided to have their proceeding in Danville. That is their business, not mine. They did it for good and sufficient reason, so far as I know. I make no charges about forum shopping. I merely say that having done that and having returned an indictment, though re-

turning it here, we are entitled to have Rule 21-B operate, whether or not the Defendant may have chosen forums in certain patent cases. Where there is a single patent involved, where there is relatively minor issues is no answer whatsoever to whether or not we are entitled to have this trial in Minnesota, where there are thirty-eight cases involved, much less all of these other matters to which reference is made in the indictment. I might say also in passing that these documents which he has handed to the Court marked 31415, 31765 and 31776 and 31775, and I believe one of the others, were submitted to Mr. Jinkinson under the claim of privilege which was to be determined in accordance with procedures outlined in correspondence between the parties, but which never have been decided or submitted to the Court for decision. They are correspondence and memoranda between Patent Counsel for Minnesota Mining and officials of Minnesota Mining, and I think comes squarely within the privilege rule, unless indeed Judge Campbell's decision of the other day in the case, which your Honor might be familiar with is applicable. I have a high respect for Judge Campbell, but I think he was wrong in that one. He held in that case a corporation is not entitled to claim privilege of attorney and client. So far as I know it is the first time any such holding has ever been made, but I think he said it was the first time. He struck out and made some new law there. Aside from that, I do think that these are privileged and would [fol. 237] argue that at the proper time to the Court, but in any event the argument I just made is the main one, and which is that that should have no bearing whatsoever on this motion we make which must be decided I submit to the Court upon the basis of the facts that the Courts have held should determine these matters and not upon side issues which cannot determine these matters.

The Court: Thank you. We will take five minutes.

Thereupon a short recess was taken and afterwards proceedings were had as follows:

Mr. Chadwell: Your Honor, may I make one more observation?

The Court: Surely.

Mr. Chadwell: I omitted to make this, in reference to this additional affidavit of Mr. Hunt, which was filed with the Court this morning, and to which Mr. Jinkinson made reference in his remarks. As I understood Mr. Jinkinson, he said that this case, if transferred, would be brought on the trial calendar after the pending civil cases up there. He was mistaken about that if he did say that. They will not be placed on the trial calendar cases. There is a special criminal calendar which cases are tried before the civil cases under the rule. And I also call the Court's attention to the Hunt affidavit which we filed today. There are nineteen criminal cases for trial and one hundred twenty-five civil cases, those nineteen criminal cases will be distributed, or are distributed, among three or four judges, whereas your Honor, of course, has to do the work yourself, and your civil calendar is about the same as the Calendar up there. With one judge, your criminal cases pending, I believe, are two or three, as I get the information, here, but the fact of the matter is that the calendar differences are really not significant.

ADDITIONAL ARGUMENT BY MR. JINKINSON

Mr. Jinkinson: Your Honor, I want to make just a very brief remark, and I want to address myself only to [fol. 238] the new matters that Mr. Chadwell presented this morning. I just want to say this. Mr. Chadwell mentioned two cases that Minnesota Mining had been sued. One was an equity case and one was a jury case. The jury case was in 1953. Now of course that's irrelevant how many cases they have lost. What is more relevant, I think, and the thing Mr. Chadwell overlooked completely. He didn't present to the Court or mention to the Court how many cases Minnesota Mining had won over this period of years. I can't hardly believe a company this large, a corporation this large, has only been sued twice since 1953. It is impossible for me to believe, your Honor. Also, in the jury case that they did lose, the one jury case, Mr. Chadwell says they did lose, the newspaper says a mistrial was declared on the first trial when one of the jurors fainted as Plaintiff's attorney began to describe the Plaintiff's injuries. I can well understand how they

lost that case when the juror fainted. Your Honor, I think that Mr. Chadwell meant to confine his remarks to the fact that no criminal case, anti-trust criminal case has been denied a transfer. If he wants to limit it to that, he can't certainly mean that all courts have always granted every motion for transfer of every criminal case, because I have before me an opinion here, an opinion by Judge Starr of the Western District of Missouri—I mean Western District of Michigan, 30 Federal Rules Decision, Page 13, Page 24.

Here was an association, corporation and individuals from California indicted in Western Michigan, and there was a motion to transfer. Judge Starr says the Court must determine whether or not it is in the interests of justice that a criminal case should be transferred from the district where it was begun to the Southern District of California.

[fol. 239] "The convenience of witnesses and the expense involved may properly [be] considered in determining this question. The individual defendants and the corporate defendant are located in California. Undoubtedly the individual defendants and other witnesses from California would testify in the trial of this action, and if the trial were held in this district, they would be obliged to travel from California. On the other hand, if this action were transferred, the Government's witnesses were [sic] [would be] required to travel from this district to California. It is obvious that no district will be convenient for all of the witnesses in this action. Considering the intent of the Congress, and considering the matter of convenience of the witnesses, the Court is convinced that the transfer of this action to the Southern District of California, would not be in the interest of justice, and that the Defendant's motion to transfer should be denied."

Your Honor, in closing, let me say this. Under the outline of evidence which the Government has presented, the Defendant has inflicted substantial injury upon the residents of the Eastern District of Illinois in pursuit of

their illegal objective. Since the Defendant has to carry the heavy burden, it is a burden they must carry, not the Government, in showing the interest of justice compel a transfer. I submit on this record the motion should be denied.

The Court: Well, gentlemen, you might as well clean up the other two motions, and then I will rule on this last one first. I will probably write a short memorandum on it.

* * * * *

[fol. 240]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ILLINOIS

Criminal Action No. 61-73-D

UNITED STATES OF AMERICA, PLAINTIFF

v.

MINNESOTA MINING AND MANUFACTURING COMPANY, DEFENDANT

MEMORANDUM AND ORDER—Entered August 31, 1962

The defendant presents a motion in accordance with Rule 21(b), Fed. Rules Crim. Proc., 18 U.S.C.A., for the transfer of this case to the United States District Court for the District of Minnesota. Defendant's counsel, in their brief and argument, stress transfer to St. Paul, Third Division. (28 U.S.C.A. § 103(3)). The defendant has filed affidavits in support of its motion and the Government has filed affidavits in opposition thereto. Both the Government's counsel and defendant's counsel have filed briefs and argued their position orally, ably, and at great length.

The Government has stipulated that the offense charged in the indictment "was committed" in the Eastern District of Illinois, the District of Minnesota, and the Northern District of Illinois. Therefore, Rule 21(b) is appropriate as a basis for the motion in this case.

Under Rule 21(b) it is necessary in the determination of the motion to transfer that the Court determine from the facts and circumstances whether it is satisfied "that in the interest of justice the proceedings should be transferred." Once a court is satisfied that it would be "in the interest of justice" to transfer under Rule 21(b) it becomes obligatory upon the court to enter an order of transfer.

[fol. 241] The term "in the interest of justice" is broad in its meaning. It requires an examination of many fac-

tors as criteria in determining the defendant's motion. The defendant in its brief sets out these factors as follows:

1. Location of corporate defendant.
2. Location of possible witnesses.
3. Location of events likely to be in issue.
4. Location of documents and records likely to be involved.
5. Disruption of defendant's business unless the case is transferred.
6. Expense to the parties.
7. Location of counsel.
8. Relative accessibility of place of trial.
9. Docket condition of each district or division involved.
10. Any other special elements which might affect the transfer.

A review of these factors should determine whether the case should be transferred. See United States v. National City Lines, D.C.S.D.Cal., 1947, 7 F.R.D. 393. The Court will discuss each factor, taking into consideration the facts set out in the affidavits, briefs, and oral argument. Furthermore, the Court will at all times keep in mind that the defendant is to be considered innocent of the charge in the indictment.

The indictment in this case charges the defendant, in nine counts, with violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C., by the unlawful manipulation or misuse of patents. The first three counts set the pattern for counts four, five, six, and seven, eight, and nine. The first three counts are concerned with pressure sensitive tapes. Count one charges the defendant and others with an at-[fol. 242] tempt to monopolize the flow of pressure sensitive tapes in the United States and in foreign countries. Count two charges the defendant with conspiracy in restraint of trade or commerce among the several states etc. 15 U.S.C. § 1. Count three charges the defendant with conspiracy to monopolize trade or commerce among the several states etc. 15 U.S.C. § 2. Counts four, five and six are similar, but the charges are in regard to

magnetic recording media. Counts seven, eight, and nine refer to aluminum presensitized lithographic plates.

LOCATION OF DEFENDANT AND CO-CONSPIRATORS

The defendant is a corporation, organized under the laws of Delaware, and has its principal place of business in St. Paul, Minnesota. It has been located there since about 1911. Its main research laboratory and several manufacturing plants are all in and about St. Paul; thirty-three plants and twenty branch sales offices are located outside Minnesota.

The co-conspirators named in the indictment, with their location, are as follows:

Johnson & Johnson	New Brunswick, New Jersey
Permacel-LePage's, Inc.	New Brunswick, New Jersey
Permacel Tape Corporation	New Brunswick, New Jersey
Industrial Tape Corporation	New Brunswick, New Jersey
The Revolite Corporation	New Brunswick, New Jersey
The Kendall Company	Boston, Massachusetts
Norton Company	Worcester, Massachusetts
The Seamless Rubber Company	New Haven, Connecticut
Johns Manville Corporation	New York, N. Y.
A. B. Dick Company	Niles, Illinois
Armour Research Foundation of Illinois Institute of Technology	Chicago, Illinois

[fol. 243] POSSIBLE WITNESSES

Defendant states "twenty-four former or present employees of alleged co-conspirators testified before the grand jury or were interrogated informally by government counsel in Chicago. Of these, at least eleven reside in New Jersey or New York within reasonable proximity to the New York metropolitan area, four are from Massachusetts, four are from the Chicago area, and two or three spend their time between Florida or Arizona and the Eastern seaboard." The location and number of

other witnesses before the grand jury, excepting 3M personnel, are as follows:

"St. Paul, Minnesota	(1)
Chicago, Illinois area	(2)
New York City area	(8)
Boston, Massachusetts	(2)
Philadelphia, Pennsylvania	(1)
Reading, Pennsylvania	(1)
Kansas City, Missouri	(1)
San Francisco, California	(1)
Los Angeles, California	(1)
Miami, Florida	(1)"

The Government, through its attorney, Mr. Earl Jenkinson, states in his affidavit that "while [he] will not reveal their home locations, he will state that a substantial number of the government's witnesses live within a 300 mile radius of Danville, Illinois, whereas only one or two of its presently contemplated witnesses live within a 300 mile radius of St. Paul-Minneapolis, and they are minor [fol. 244] witnesses. Danville is substantially closer and more convenient for the majority of the key government witnesses." Thus, it appears that those witnesses who are officers or employees of the defendant will find it more convenient if the case was transferred to Minneapolis-St. Paul, but as to other witnesses the question of convenience is not so easily determined.

LOCATION OF EVENTS LIKELY TO BE IN ISSUE

In the main the indictment charges the defendant with improper use of its patents in coercing competitors to accept patent license agreements on illegal terms by suing or threatening to sue for infringement. The Government states one of these patent infringement suits was tried in this District of East St. Louis, and that others occurred in various parts of the United States. The defendant insists that it was an involuntary party plaintiff in the East St. Louis action. The defendant states that more activities by the defendant in relation to patents occurred in the District of Minnesota, where its patent attorneys are located, than in the Eastern District of Illinois. It is

difficult for this Court to determine without the disclosure of evidence by both Government and defendant where the greater number of these negotiations took place. The defendant contends that venue on all counts does not exist in the Eastern District of Illinois. The indictment alleges venue in the Eastern District of Illinois. The defendant would not suffer if the Government would fail to prove venue, because the indictment or counts in the indictment so affected would have to be dismissed.

DOCUMENTS

The Government now has nine large heavy corrugated boxes, 24 inches long, 15 inches wide, and 13 inches deep containing documents relative to this cause in the Clerk's [fol. 245] office in Danville, Illinois. Over 15,000 of these documents were obtained from the defendant. The other documents which the defendant might use at the trial are located in St. Paul. It would be an inconvenience for the defendant to locate and transport the necessary documents which it might use at the trial to Danville. On the other hand, the Government would be required to transport its documents to Minneapolis-St. Paul. No claim is made that the documents which the defendant might use will be indispensable to defendant's day to day operation of its business.

DISRUPTION OF BUSINESS OF DEFENDANT

There can be little doubt that if the trial occurred in St. Paul there would be less disruption of defendant's business. Consultation preparatory for trial between defendant's officers and employees and counsel could be conducted at St. Paul, wherever the trial occurred. Consultation during the trial could be conducted by telephone whether the cause was tried in St. Paul or Danville. Naturally, counsel could talk in person with defendant's officers and employees if the trial were held in St. Paul. The trial will take considerable time wherever the case is tried and it will require some of defendant's officers and employees to take time from defendant's business, but when consideration is given to the size of defendant's

operation, the number of its plants, and their locations, the interruption of defendant's business should not be too great.

EXPENSES TO PARTIES

If the trial were held in the Eastern District of Illinois rather than in St. Paul, the home District of the defendant, it would be more expensive to the defendant. The defendant would be required to hire local counsel if the case were tried in Danville, but could use its local general counsel in St. Paul. In St. Paul, defendant states, [fol. 246] office space for defendant's attorneys could be easily supplied without cost, but not in Danville. The witness fees to be paid by the Government would be less in total amount if the case were tried in Danville, for the reason that Danville is more centrally located than St. Paul. The expense to the defendant for transporting its officers and employees as witnesses would be a lesser amount if the cause were tried in St. Paul. The Government contends that it will not be required to rent office space in Danville because the United States District Attorney for the Eastern District of Illinois has office space available. Possibly the United States District Attorney in St. Paul would make space available to counsel for the Government.

LOCATION OF COUNSEL

The Government attorneys are located in Chicago, and Mr. Chadwell and Mr. McGee, who have appeared for the defendant in this case, are also located in Chicago. The defendant's legal department and its retained patent lawyers are located in St. Paul. Danville can be easily reached from Chicago, Illinois, by automobile, air, or train.

ACCESSIBILITY OF PLACE OF TRIAL

Defendant maintains that St. Paul is more accessible for all the witnesses and attorneys. There are direct air flights from New York to Minneapolis-St. Paul, and this might accommodate the witnesses from Metropolitan New

York. This distance to Minneapolis-St. Paul would be greater than if the witnesses traveled from the New York area to Chicago, and then to Danville. There are more rail and air connections between Chicago and St. Paul than between Danville and Chicago. Danville has an airport which will accommodate most all piston planes. It [fol. 247] has a schedule of flights from Chicago to Danville and return as follows:

Chicago to Danville	10:25 a.m.	arrive	11:29	a.m.
Chicago to Danville	3:15 p.m.	arrive	4:51	p.m.
Chicago to Danville	6:30 p.m.	arrive	7:34	p.m.
Danville to Chicago	7:53 a.m.	arrive	8:55	a.m.
Danville to Chicago	11:24 a.m.	arrive	12:24	p.m.
Danville to Chicago	4:48 p.m.	arrive	5:50	p.m.

The train service from Chicago to Danville and return is as follows:

Chicago & Eastern Illinois Railroad—

Lv. Chicago	3:45 p.m.	arrive	5:54	p.m.
Lv. Chicago	8:00 p.m.	arrive	10:20	p.m.
Lv. Chicago	10:45 p.m.	arrive	12:56	a.m.
Lv. Danville	7:00 a.m.	arrive	9:05	a.m.
Lv. Danville	5:00 p.m.	arrive	7:50	p.m.

Air travel is on Daylight and Eastern Time and train travel is on Standard Time.

Danville is also 86 miles from Indianapolis, Indiana, and about 60 miles from Terre Haute. Plane, bus, or train connections could be made from Terre Haute to Danville, and plane and bus connections from Indianapolis.

The Wabash Railroad Company has two trains a day into Danville from St. Louis, Missouri, and two from Detroit, Michigan.

There are also excellent hardroads in all directions to Danville and especially from Chicago. With the excellent roads between St. Paul and Danville, without entering the [fol. 248] heavy traffic in Chicago, the trip can be made by automobile in about twelve hours. This Court has driven this route in twelve successive hours.

Witnesses are usually interviewed by counsel before they take the witness stand. Witnesses could easily arrive in Danville the night before they were to be used, thus, giving counsel an opportunity to interview the witness before the witness is used.

The defendant also operates its own planes. These could be used for transportation of counsel, officers, and employees of the defendant, as well as for the purpose of transporting necessary documents. It probably would not take more than three hours to fly from St. Paul to Danville, a distance of approximately 500 miles.

DOCKET CONDITION

The docket in Danville, without a doubt, would provide a trial at an earlier date than in the Minnesota District. At the present time there are but two criminal trials pending on the Danville docket, and these are set for trial September 19 and 20.

SPECIAL ELEMENTS OF HARDSHIP.

From the affidavit of Mr. William L. McKnight, Chairman of the Board of defendant, it appears he is the gentleman who is mainly responsible for the phenomenal growth of 3M. No doubt he is a most capable and fine gentleman. His physical condition, unfortunately, may be somewhat taxed by his attendance at the trial whether the trial occurs in St. Paul or Danville. The newspaper clippings displaying photographs, exhibited to the Court by Government's counsel, show that Mr. McKnight was able to attend a dance and to look after his racing stable last February. He had a serious operation in March, 1961 but apparently has recovered and is now in substantially good health. While this Court feels most kindly toward a man of Mr. McKnight's age, it is this [fol. 249] Court's opinion that he could make himself most comfortable in one or the other of Danville's hotels, or at the new Holiday Inn Motel which will soon be ready for occupancy, and is only one block from the federal building.

There is one other item which cannot be overlooked in passing upon this motion. For more than 50 years 3M has had many employees and stockholders in the St. Paul

area. 3M has grown from a small corporation to an industrial giant while located in the St. Paul area. Its officers and employees have been active in civic affairs. They hold official positions in over thirty-three financial, civic, and educational institutions. All of these activities are to the credit of 3M, but at the same time when one considers the number of contacts that its employees and stockholders have made over the area, and the pride that the community in that area would have, and should have, in 3M, there might exist a very severe influence on any citizen in the area called for jury service. It also must be noted that the charge in the indictment is a misdemeanor, and that the Government and the defendant each have but three peremptory challenges. Rule 24(b), Federal Rules of Criminal Procedure, 18 U.S.C.A. Counsel for the defendant, in his argument, has made the suggestion that the jury might be drawn from outside the counties of Ramsey and Hennepin where there isn't the concentration of officers, employees, and stockholders of 3M. The influence of 3M and its personnel would probably make itself felt among the citizens in the counties adjacent to Ramsey County where St. Paul is located and to Hennepin County where Minneapolis is located. These facts are material in determining whether the cause should be tried. See United States v. Hoffa, D.C.S.D. Fla., 1962, 205 F. Supp. 710, 722. It would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois.

[fol. 250] This Court has carefully reviewed the facts and circumstances relating to the transfer of this case "in the interest of justice". Some facts mentioned by counsel have not been noted in order not to lengthen this memorandum. The Court has concluded that "in the interest of justice" the cause should be tried in the Eastern District of Illinois.

Therefore, the motion to transfer is denied.

IT IS SO ORDERED.

Entered this 31st day of August, 1962.

Casper Platt
United States Distrlct Judge

[fol. 251]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No.

MINNESOTA MINING AND MANUFACTURING COMPANY,
PETITIONER

vs.

HON. CASPER PLATT, Chief Judge, United States District Court, Eastern District of Illinois, RESPONDENT

PETITION FOR WRIT OF MANDAMUS—Filed September 15, 1962

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

Now comes the petitioner, Minnesota Mining and Manufacturing Company, a Delaware Corporation, by its attorneys, and petitions this Court for the entry of a writ of mandamus directed to the respondent, Honorable Casper Platt, Chief Judge of the United States District Court, Eastern District of Illinois, directing him to vacate the order entered by him on August 31, 1962 denying petitioner's motion under Rule 21(b) of the Federal Rules [fol. 252] of Criminal Procedure* to transfer the action

* Rule 21 (b) provides:

"*Offense Committed in Two or More Districts or Divisions.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

That venue lies in the District of Minnesota has been conceded (App. 8).

now pending before him entitled *United States* v. *Minnesota Mining and Manufacturing Company*, Criminal Action No. 61-73-D, to the District of Minnesota, the home district of the sole defendant, and directing him to transfer the action to the District of Minnesota.

Respondent denied petitioner its right to a trial of this criminal case in its home district mainly on the ground that the government could not obtain a fair trial in the Federal Courts of the District of Minnesota. Petitioner respectfully submits that in so doing respondent ignored the decisions of the Supreme Court and of this Court as well as the purpose of Rule 21(b) of the Federal Rules of Criminal Procedure, and usurped the functions of the District Court of Minnesota. The holding would make it virtually impossible for a corporate defendant in a multivenue criminal case to obtain trial anywhere except in the forum selected by the prosecution contrary to the purpose of Rule 21(b) and to the uniform and consistent decisions of the federal courts. Respondent's action was so clearly erroneous as to constitute a severe abuse of discretion in derogation of the constitutional rights of the petitioner and can only be corrected by issuance of the requested writ.

The facts upon which petitioner is entitled to the requested writ are fully set forth in the affidavits included in the Appendix and in the Brief accompanying this [fol. 253] petition. The proceedings to date pertinent to this petition may be summarized as follows:

On December 13, 1961, petitioner, which has no offices, plants or other facilities in the Eastern District of Illinois, but whose general and administrative offices are located in St. Paul, Minnesota, was indicted by the Federal Grand Jury sitting in Danville. The indictment in nine counts, charges that the petitioner, the sole defendant named in the indictment, and unindicted alleged co-conspirators, named and unnamed, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 and 2, have attempted to monopolize, engaged in a combination and conspiracy in restraint of, and conspired to monopolize interstate and foreign trade and commerce in pressure sensitive tapes since 1931 (Counts One, Two, Three), in magnetic recording media since 1946 (Counts Four, Five,

Six), and in aluminum presensitized lithographic plates since 1950 (Counts Seven, Eight, Nine). The "Jurisdiction and Venue" paragraphs of the indictment in all counts charge only that the alleged offense was carried out in part within the Eastern District of Illinois and that petitioner "has performed acts . . . in furtherance of the offense" within the Eastern District and within five years of the date of the indictment. No specific acts in the formation or carrying out of the alleged offenses are charged by the indictment to have taken place within the Eastern District.

Petitioner has sought informally by letter and formally by motion for a limited bill of particulars to obtain information from the prosecution as to location of its probable witnesses and other matters pertinent to a motion to transfer under Rule 21(b). The requests and the motion were both denied (App. 131, 141).

Petitioner's motion to transfer was filed on March 12, 1962; briefs and affidavits in support of and in opposi-[fol. 254] tion to the motion were also filed by both parties; the court heard oral argument on June 14, 1962 and August 21, 1962. The Memorandum and Order denying the motion, which is set forth verbatim in the Appendix (App. 3), was received by petitioner's counsel on September 4, 1962.

For the convenience of this Court, all of the facts which are included in the accompanyiang Appendix and Brief and on which this petition is based will not be repeated here, but the main points on which petitioner relies can be summarized as follows:

1. By refusing to transfer this cause to petitioner's home district, respondent ignored the decisions of Courts of Appeals and District Courts* which have consistently held that criminal cases, particularly multi-venue cases such as antitrust conspiracy cases, will be transferred to a defendant's home district in accordance with the instructions of the Supreme Court in *United States* v. *Johnson*, 323 U.S. 273, 276 (1944) to the effect that the constitutional concern for trial in the home district of the de-

* *E.g., United States* v. *Cashin*, 281 F. 2d 669 (2d Cir. 1960); *United States* v. *General Motors Corp.*, 194 F. Supp. 754 (S.D. N.Y. 1961).

fendant, must be respected unless there are overwhelming reasons against it. No such reasons are included in respondent's Memorandum and Order, nor are they present in this case.

2. By apparently basing the denial of the transfer on the supposed difficulty or inability of the government in this criminal case to obtain a fair and impartial jury in the District of Minnesota, respondent ignored the statement of this Court in *Chicago, R. I. & Pac. R. R.* v. *Igoe*, 212 F. 2d 378, 382 (7th Cir. 1954), that:

> "Furthermore, we cannot presume that a trial will proceed other than fairly in any federal forum in which venue exists."

[fol. 255] 3. Respondent's expressed fear that a fair and impartial jury could not be obtained in the District of Minnesota is totally unwarranted by the record and is a usurpation of the functions of the District Court of Minnesota, which is furnished adequate tools by statute and by rule, as well as by common law, to insure that all parties will obtain a fair and impartial trial.

4. By apparently accepting oral assertions of government counsel with respect to the influence of petitioner in the District of Minnesota, respondent ignored or failed to take into account the only facts and figures in the record as to the number of employees and stockholders of the petitioner who live in the District of Minnesota and various counties and divisions thereof, which demonstrate that less than 1% of the population of the District of Minnesota is made up of such persons, all of whom could be challenged for cause in any event.

5. By applying legal tests and standards for venue in antitrust conspiracy cases rather than the legal tests and standards applicable to motions under Rule 21(b) respondent ignored the purposes of the Rule. One of the announced purposes of the enactment of Rule 21(b) was to get away from venue tests which gave enforcement officials the sole choice as to trial location and to give defendants the right to remove causes from remote districts to their home districts. The practice of enforcement officials in bringing conspiracy actions against defendants in areas removed from their home districts even though

technical venue might lie in such district has been described as one of the "abuses which led to the adoption of" Rule 21(b). *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 395-398 (S.D. Calif. 1947).

[fol. 256] 6. By failing to give due weight to the admittedly great increase in expense, substantial inconvenience to witnesses, disruption of defendant's business and the serious obstacles to the necessary close contact between corporate executives and trial attorneys, all of which would result if the protracted trial of this case were held in Danville rather than in defendant's home district, respondent has denied to petitioner its rights under Rule 21(b). The holding ignores the basic purpose of the rule which was to eliminate the "preferential position" of the government in determining the place of trial of a criminal case and would make it virtually impossible for a corporate defendant to obtain trial anywhere except in the forum selected by the prosecutor. *United States* v. *E. I. duPont de Nemours & Co.*, 83 F. Supp. 233 (D. D.C. 1959).

For the reasons set forth herein and in the accompanying Brief, petitioner respectfully requests that this Court issue its writ of mandamus directed to the Honorable Casper Platt, Chief Judge of the United States District Court for the Eastern District of Illinois, Danville, Illinois, ordering him to vacate his order of August 31, 1962, denying petitioner's motion to transfer the cause now pending before him entitled *United States* v. *Minnesota Mining and Manufacturing Company*, Criminal Action No. 61-73-D, and ordering him to transfer said cause to the United States District Court for the District of Minnesota.

MINNESOTA MINING AND
MANUFACTURING COMPANY

By: JOHN T. CHADWELL
GLENN W. MCGEE
ROBERT F. HICKMAN
JOHN L. CONNOLLY
Its Attorneys

[fol. 257]

Duly sworn to by John T. Chadwell
jurat omitted in printing
(all in italics)

[fol. 258]

* * * *

IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

* * * *

Before
Hon.. WIN G. KNOCH, Circuit Judge

No. 13902

MINNESOTA MINING AND MANUFACTURING COMPANY, PETITIONER

vs.

HONORABLE CASPER PLATT, Chief Judge, United States District Court, Eastern District of Illinois, RESPONDENT

Petition for Writ of Mandamus.

RULE TO SHOW CAUSE—October 2, 1962

This matter comes before the Court on the petition of counsel for Minnesota Mining and Manufacturing Company for the entry of a writ of mandamus directed to the respondent, Honorable Casper Platt, Chief Judge of the United States District Court, Eastern District of Illinois, directing him to vacate the order entered by him in August 31, 1962 denying petitioner's motion under Rule 21(b) of the Federal Rules of Criminal Procedure to transfer the action now pending before him entitled *United States* v. *Minnesota Mining and Manufacturing Company*, Criminal Action No. 61-73-D, to the District of Minnesota, and directing him to transfer the action to the District of Minnesota.

On consideration whereof, it is ordered that respondent show cause, if any there be, why a writ of mandamus should not issue as prayed by filing in the office of the Clerk of this Court an original and five (5) copies of his response to this Rule within thirty (30) days from this date.

[fol. 259]

IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13902

(Title Omitted)

ANSWER TO RULE TO SHOW CAUSE—Filed November 1, 1962

The Honorable Casper Platt, Chief Judge of the United States District Court for the Eastern District of Illinois, respondent, for answer to the Rule to Show Cause heretofore issued by this Court and served upon him, says as follows:

1. The order of this respondent entered on August 31, 1962 in the cause pending before him, known as *United States of America* v. *Minnesota Mining and Manufacturing Company*, Criminal Action No. 61-73-D, was made after hearings held on June 14, 1962 and August 21, 1962 (R. App. 1-110)[1] by respondent for the purpose of [fol. 260] determining whether or not the said cause should be transferred to the District of Minnesota upon motion of the defendant, petitioner herein, under Rule 21(b) of the Federal Rules of Criminal Procedure.

2. Respondent, after examining all the relevant factors and considering the arguments of able counsel, was not satisfied the petitioner had established that the "interest of justice" would be promoted by the transfer and, by his memorandum and order of August 31, 1962, denied petitioner's motion.

3. Petitioner's suggestion that the sole or main ground for denying transfer was respondent's conclusion that it would be more difficult for the Government to obtain an

[1] "R. App." refers to Appendix to Respondent's Brief; "App." refers to Appendix to Petitioner's Brief.

impartial jury in the District of Minnesota is an incorrect assumption. Said factor was but one of a number of factors, all of which are fully set forth in respondent's brief, which led respondent to his conclusion. In the memorandum and order, respondent mentioned the numerous factors considered (adopting those advocated by petitioner) and pointed out that he had considered additional facts not there mentioned in the interests of brevity. (App. 4, 13.)

4. Petitioner's contention that respondent applied a test as to whether venue existed at all in the Eastern District of Illinois as the basis for deciding the motion, rather than the standards applicable to Rule 21(b) motions, is difficult to understand. The suggestion ignores entirely the discussions during the hearings as well as the views of respondent expressed in his memorandum and order. The contention rests entirely upon a comment made by respondent in his memorandum and order to the effect that the defendant would not suffer if venue were not proven, as a dismissal would result (App. 7)—said comment was directed solely to petitioner's repeated assertion that there was no showing of any overt acts in the [fol. 261] Eastern District of Illinois. It was not a statement of the standard by which a Rule 21(b) motion is to be tested, as respondent clearly set forth what it considered the applicable legal standard in the initial portion of his memorandum and order. (App. 4.)

5. Petitioner's contention that respondent ignored a "constitutional concern" set forth in the case of *United States* v. *Johnson, et al.*, 323 U. S. 273 (1944) is without substance. To begin, respondent did consider the fact that petitioner was headquartered in St. Paul, Minnesota, as one of the factors to be evaluated, but did not find it all-controlling. Secondly, the "constitutional concern" view of the *Johnson* case is really a venue standard, which was used in that case to favor a decision that, where a question existed as to whether the crime was committed in defendant's home district or elsewhere, preference would be given to deciding it was committed *only* in defendant's home forum. As petitioner here demonstrates, Rule 21(b) motions are not to be construed by

venue standards, but by Rule 21(b) standards. So tested, location of defendant's home is but one of many factors to be evaluated. The single case cited by petitioner[2] which purports to apply "constitutional concern" to a Rule 21(b) motion, under the assumption that the Court of Appeals for the Second Circuit had so done in *United States* v. *Cashin*, 281 F. 2d 669 (C. A. 2, 1960), completely misconstrued that court's opinion. Finally, recent decisions of the Supreme Court, as well as those preceding *Johnson*, cast considerable doubt upon Justice Frankfurter's interpretation of "constitutional concern" as stated in the *Johnson* case.

6. This respondent gave consideration to all factors urged by petitioner and found several which militated against transfer. It appeared to respondent that the trial [fol. 262] of the case would be delayed at least a year by the transfer, and the Government avowed a speedy trial was essential because some of petitioner's competitors are in financial straits owing to petitioner's alleged conduct and to the fact that petitioner has refused to halt its allegedly illegal activities; that the Government's witnesses may be inconvenienced if forced to travel to the northern city of St. Paul, Minnesota; that the Government's documents are already in Danville in the custody of the Clerk of the Court and would have to be transported to St. Paul; that transfer would increase the Government's expenses because its witness' fees would be greater, as would cost of transportation of the Government's staff; that it would be more difficult for the Government to get an impartial jury in St. Paul than in Danville.[3] It further appeared to respondent that petitioner has operated on a nation-wide scale in its business of licensing and selling in the industries here involved; that there is support for the Government's avowal that petitioner's overt acts have substantially affected the resi-

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[2] *United States* v. *General Motors Corporation*, 194 F. Supp. 754 (S. D. N. Y., 1961).

[3] The latter may properly be considered since both sides are entitled to a fair jury and obstacles thereto adversely affect the "interest of justice."

dents of the Eastern District of Illinois; that this is not an "imported" case; and that, considering all the evidence and facts in the over-all, trial in the Eastern District of Illinois would be in the "interest of justice."

7. While petitioner would suffer some additional inconvenience and hardship, it does not appear to respondent that its every assertion must be taken at face value, since not all of its executives need be in Danville at one time; communications via long distance telephone will eliminate much travel; the bulk of the documents used in the trial relates to events no longer current so their absence from St. Paul will not disrupt everyday business operations; [fol. 263] copies of many of the Government's documents are located in the office of petitioner's counsel in Chicago and must be moved in any event; petitioner's private planes can carry its executives and documents from St. Paul to Danville in three hours; Mr. McKnight can obtain adequate medical attention in Danville, as well as in Miami Beach, and petitioner was temporarily willing to assume all such inconvenience and expense just to have the trial in Chicago.

For the foregoing reasons and those set forth in its brief, respondent respectfully submits that his ruling was proper and, in any event, that the facts do not establish that a gross abuse of discretion has been presented, as is required for invoking the extraordinary remedy of mandamus.

WHEREFORE, your respondent, having fully and completely answered this Court's Rule to Show Cause, respectfully requests that respondent should be discharged from the said Rule, and respondent go hence *sine die*.

CASPER PLATT
Chief Judge,
United States District Court,
Eastern District of Illinois.

[fol. 264]

IN UNITED STATE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13902

SEPTEMBER TERM, 1962 JANUARY SESSION, 1963

MINNESOTA MINING AND MANUFACTURING COMPANY, a Delaware corporation, PETITIONER

v.

HON. CASPER PLATT, Chief Judge, United States District Court, Eastern District of Illinois, RESPONDENT

Petition for Writ of Mandamus.

OPINION—February 27, 1963

Before HASTINGS, *Chief Judge*, DUFFY and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Petitioner, Minnesota Mining and Manufacturing Company, a Delaware corporation, having filed in this court its petition for the issuance of a writ of mandamus directed to Honorable Casper Platt, Chief Judge of the United States District Court for the Eastern District of Illinois, respondent, commanding him to vacate an order which he entered on August 31, 1962, denying petitioner's motion under 18 U. S. C. A. Rule 21(b) of the Federal Rules of Criminal Procedure, to transfer Criminal Action No. 61-73-D then pending in said district court, to the district court in the District of Minnesota, described as the home district of petitioner, the sole defendant in that proceeding, and also commanding him to transfer the action to the said Dis-

trict of Minnesota, we ordered respondent to show cause [fol. 265] why the writ should not issue, as prayed.

In his answer respondent informed us that he held hearings and that, after examining all the relevant factors, he was not satisfied the petitioner had established that the "interest of justice" would be promoted by the transfer.

In a memorandum accompanying his order, respondent discussed the term "in the interest of justice" and completed an analysis of the facts produced before him, by stating:

> "There is one other item which cannot be overlooked in passing upon this motion. *For more than 50 years 3M has had many employees and stockholders in the St. Paul area. 3M has grown from a small corporation to an industrial giant while located in the St. Paul area.* Its officers and employees have been active in civic affairs. They hold official positions in over thirty-three financial, civic, and educational institutions. All of these activities are to the credit of 3M, but at the same time when one considers the number of contacts that its employees and stockholders have made over the area, and the pride that the community in that area would have, and should have, in 3M, there might exist a very severe influence on any citizen in the area called for jury service. It also must be noted that the charge in the indictment is a misdemeanor, and that the Government and the defendant each have but three peremptory challenges. Rule 24(b), Federal Rules of Criminal Procedure, 18 U. S. C. A. Counsel for the defendant, in his argument, has made the suggestion that the jury might be drawn from outside the counties of Ramsey and Hennepin where there isn't the concentration of officers, employees, and stockholders of 3M. The influence of 3M and its personnel would probably make itself felt among the citizens in the countries adjacent to Ramsey County where St. Paul is located and to Hennepin County where Minneapolis is located. *These facts are material in determining where the cause should be tried.*

See *United States* v. *Hoffa*, D. C. S. D. Fla., 1962, 205 F. Supp. 710, 722. *It would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois.*

"This Court has carefully reviewed the facts and circumstances relating to the transfer of this case 'in [fol. 266] the interest of justice.' Some facts mentioned by counsel have not been noted in order not to lengthen this memorandum. The Court has concluded that 'in the interest of justice' the cause should be tried in the Eastern District of Illinois." (Italics supplied.)

In his answer, respondent asserts that his

"* * * conclusion that it would be more difficult for the Government to obtain an impartial jury in the District of Minnesota * * * was but one of a number of factors, * * * which led respondent to this conclusion. * * *".[1]

1. Rule 21(b) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., provides:

"* * * The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

It was stipulated that venue for the offense charged in the indictment lay in both the Eastern District of Illinois and the District of Minnesota. Therefore, it was

[1] While respondent in his memorandum and order referred to the alleged difficulty of getting a fair and impartial jury in the Minnesota district, after he had discussed the other matters considered relevant to a transfer, we are convinced that he saved the most important item for the last. He did admit that the facts pertaining thereto were material in determining where the cause should be tried. Certainly he was not expressing a minor afterthought.

the duty of the court to transfer the case to the District of Minnesota if it was satisfied that in the "interest of justice" the proceedings should be transferred. No question of venue is before us. The sole question for respondent was whether the transfer to the District of Minnesota would be in the "interest of justice".

While we would not be justified in overriding a denial of transfer based upon a valid exercise by the court of its discretion, it is nevertheless true that we may set aside its action if there is an abuse of discretion, such as its reliance upon an improper factor in determining how the "interest of justice" would be affected by the proposed [fol. 267] transfer. *Chicago, R. I. & P. R. Co.* v. *Igoe*, 212 F. 2d 378, 220 F. 2d 299.

The courts have repeatedly recognized the considerations of historic experience and policy which underlie those safeguards in the Constitution against opening the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It has been pointed out that such leeway leads to the appearance of abuses if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution, *United States* v. *Johnson*, 323 U. S. 273, 275. At 276, the court said:

> "These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests. These are important factors in any consideration of the effective enforcement of the criminal law. They have been adverted to, from time to time, by eminent judges; and Congress has not been unmindful of them. Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

At 277, the court distinguished a provision of the Elkins Act relied on in *Armour Packing Co.* v. *United States*, 209 U. S. 56, which made a venue provision dependent upon transportation of goods, not their sending or bringing, pointing out that transportation is a continuing phenomenon. Transportation is not a critical element in the case at bar.

In *Travis* v. *United States*, 364 U. S. 631, 634 (1961), the court explicitly admitted awareness that the venue provisions in acts of Congress should not be so freely construed as to give the Government the choice of "a tribunal favorable" to it.

In 1958, the Supreme Court, in determining the proper venue in a criminal case, *United States* v. *Cores*, 356 U. S. 405, said, at 407:

[fol. 268] "* * * In ascertaining this locality we are mindful that questions of venue 'raise deep issues of public policy in the light of which legislation must be construed.' *United States* v. *Johnson*, * * *"

2. At the hearing on petitioner's motion for transfer, the facts related in the italicized portion of respondent's memorandum, *ante* 2, were established either by affidavits, a letter of petitioner's attorney addressed to respondent, or an answer by petitioner's attorney to a question put in open court. Furthermore, we believe that the statement that its officers and employees have been active in civic affairs is a reasonable inference. However, aside from a mere unsworn statement by government counsel, there is no evidentiary basis for the statement that they held official positions in over 33 financial, civic and educational institutions. We do infer and believe that it would be probable that they would be active in such manner to some degree. We draw from these facts, for the purpose of argument, every reasonable inference to support the denial of transfer to the District of Minnesota, and yet we arrive at the conclusion that petitioner has been an exemplary citizen of that district. We cannot agree that, for that reason, it is not entitled to be tried in the vicinage of its home office. Otherwise we would be arbitrarily denying to it a right first established in 1215 when the

Magna Charta was wrung from the hands of King John at Runnymede.

3. In this case, we are also confronted with the question as to whether a district court, created for and sitting in the State of Illinois, may assume the function of deciding whether, in the criminal case at bar, it would be difficult to get a fair and impartial jury if the case were transferred, as prayed by petitioner, in reliance on rule 21 (b), to a Minnesota district, where petitioner has from a small beginning grown to be a large corporation with many employees and stockholders living in the area. Briefly stated, when venue exists in both the Illinois and Minnesota districts, it is permissible for a district court in Illinois to make a determination in the "interest of justice" under rule 21 (b) to the effect that it would be difficult for the government to procure a fair trial in the District of Minnesota? We have been cited to no federal case so holding.

The underlying spirit of the constitutional concern for [fol. 269] trial in the vicinage of the defendant, rooted in centuries of Anglo-Saxon jurisprudence and universally recognized by the federal courts, is not to be ignored. Instead, the lack of such a case is emphasized by the ineffectual efforts of respondent's counsel to justify his action in this case. Thus he cites, *United States* v. *Hoffa*, 205 F. Supp. 710, 722 (S. D. Fla. 1962), where a district court transferred a criminal case for the purpose of trial to another division of the Southern District of Florida under rule 21 (a). However, the ground for transfer was the court's opinion that the facts presented naturally tended to create an atmosphere which might present some difficulty in selecting an impartial and unbiased jury in the transferror court. In so doing, it was passing upon conditions in the district of the court which was making the transfer. It did not assume to pass upon whether a court in another judicial subdivision would or might be able to procure a fair jury or grant a fair trial.

While the opinion of the district court in the case at bar does not explicitly state that a fair and impartial jury could not be obtained in the Minnesota District, and merelly says that it would be more difficult to do so than

in the Eastern District of Illinois, the only meaningful purpose which can be attributed to the language used is that the court believed that there was a likelihood of the government not receiving a fair jury trial in Minnesota. However, a belief of a difficulty which might be encountered in procuring unprejudiced veniremen would not justify a refusal to make a transfer otherwise proper under rule 21 (b), because no court is in a position to pass upon the qualifications of jurors, except by considering their *voir dire* examination. Thus, in *Irvin* v. *Dowd*, 366 U. S. 717, 722, the court said:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. *To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the* [fol. 270] *presumption of a prospective juror's impartiality would be to establish an impossible standard.* It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. * * *" (Italics supplied.)

In *Beck* v. *Washington*, 369 U. S. 541, 557, the Supreme Court, having before it the *voir dire* examination at the trial of the defendant, said:

> "A study of the *voir dire* indicates clearly that each juror's qualifications as to impartiality far exceeded the minimum standards this Court established in its earlier cases as well as in *Irvin* v. *Dowd*, 366 U. S. 717 (1961), on which petitioner's depends. * * *"

Among the cases holding that, upon a motion under rule 21 (a) to transfer a criminal case, because of the claimed prejudice against defendant that he cannot obtain a fair

trial, *"the proper occasion for such a determination is upon the voir dire examination"*, are *United States* v. *Kline*, 205 F. Supp. 637, 640 (D. Minn. 1962), and *Blumenfield* v. *United States*, 8 Cir., 284 F. 2d 46, 51 (1960).

Respondent relies on certain dictum in *Kirk* v. *Spur Distribution Co.*, 95 F. Supp. 428 (D. Del. 1950). Plaintiff, a resident of Arkansas, brought suit in the federal district court in Delaware, against the corporate defendant, which existed under the laws of that state. He had theretofore brought a suit in a state court in Arkansas against the same defendant but when the case had proceeded to the point of summation to the jury, he took a voluntary nonsuit. In the federal court in Delaware, plaintiff resisted a motion to transfer the case to the United States District Court for the Eastern District of Arkansas, because "he cannot obtain a fair trial in Helena, Arkansas" and "it is not 'in the interest of justice' to transfer plaintiff to a place where he cannot obtain a fair trial". The district judge commented that plaintiff's statement "is such a severe indictment of a court of justice that the mere ipse dixit to that effect cannot alone be accepted, but we must look to the supporting facts". These "supporting facts" tended to show that racial antagonism was alleged to have been the underlying cause of plaintiff's trouble which culminated in the first suit being filed. The district judge in Delaware considered affidavits offered by plaintiff and by defendant, including those executed by counsel and clerks of the [fol. 271] courts in Arkansas, both state and federal. He then decided that these affidavits set out no prejudice or bias that would or could exist for either reason assigned by plaintiff.

According to the district judge, the affidavit of the presiding judge in the former trial set out:

> "that every juror was thoroughly examined 'for the purpose of ascertaining whether there was any bias or prejudice; that the jury finally selected to try the cause was acceptable by counsel for the respective parties litigant; that the jury finally selected was composed of businessmen of Phillips County whose integrity and honesty was above reproach; that dur-

ing the entire trial of said cause there was no evidence offered, directly or indirectly, which would show or infer any malice, bias or prejudice for or against the parties litigant; that there was no question of racial prejudice involved or concerned in this trial * * *', and that there was no malice, bias or prejudice displayed either by the Court officials or jurors during the trial of the cause."

The district judge concluded, at 431, that there was no evidence of unfairness in the former trial.

Nevertheless plaintiff persisted that he could not obtain a fair trial in Phillips County, Arkansas, with a jury drawn from that vicinity. The district court pointed out that the district had a population of over 200,000 and said, at 431:

"* * * For one to say that from that number an impartial and unprejudiced jury cannot be drawn is to state an extreme position. But even with this population the plaintiff might still think that a minimum of jurors from Phillips County and a trial at Helena would still prevent a fair and impartial trial.

"The affidavit of the counsel for the plaintiff pays high tribute to the United States Judge presiding in the Division to which it is sought to transfer this case. The affidavit states, 'I also wish to state that I feel that if the case is transferred to the United States District Court for the Eastern Division of the Eastern District of Arkansas and tried at Helena without a jury that both parties would receive a fair and impartial trial and that no prejudice would exist against either party.'

[fol. 272] "It seems hardly necessary for me to point out that both the place of trial and composition of the jury may largely be safeguarded by the judge *who is thus shown so acceptable.*" (Italics supplied.)

After calling attention to 28 U.S.C.A. §1404 (c), which provides "A district court may order any civil action to be tried at any place within the division in which it is pending", and 28 U. S. C. A. § 1865 (a), which states that

petit jurors "shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial", *the district judge stated that he was of the opinion that the case should be transferred to the Arkansas federal court.*

The *Kirk* case not only fails to support respondent's position in the case at bar, but it is an illuminating illustration of the impropriety of vesting any district judge with authority to assess the quality of justice which he foresees may be meted out by a federal court in another district. If, in passing on a motion to transfer a case to another district, a court may consider affidavits tending to establish the high tribute paid to a presiding judge of the latter district, it could consistently be argued that he could also consider affidavits or other proof impugning the standing and qualifications of such a judge. Thus the ability of a transferee court to afford a fair trial, to the extent that it was thought to depend on the qualifications of the presiding judge thereof, would be open to judicial scrutiny and assessment by a court of another district.

We believe it would be an unsound and dangerous innovation in our federal court system for a judge in any district to appraise or even speculate as to the efficacy of the operations of a federal court of concurrent jurisdiction in another district. It follows that no order in any way based upon such reasoning can stand, even under the guise of an exercise of discretion.

4. While, in acting on a motion to transfer under rule 21 (b), a district court has a broad discretion, yet the determination of the requirements of "the interest of justice", should be given primary consideration. Thus, in *Igoe*,[2] at 303, we said:

> "* * * In the interest of justice there should be considered the relative ease of access to sources of [fol. 273] proofs; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; * * * and the state of the court calendar both in the District where the case

[2] 220 F. 2d 299, 303.

—is pending, and in the District to which it is sought to have the case transferred."

But, in the case at bar, in addition to the demonstration by proof or admission of the essential elements of convenience, expense and early trial, constituting "interest of justice" in a civil case[3] as outlined in *Igoe*, this criminal case is impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district, as we have point out, *ante* 5. Consequently, we are convinced that this multiple-venue criminal prosecution should be tried in the district of Minnesota, which is the home of petitioner.

The the reasons herein set forth, a writ of mandamus will issue forthwith, directed to respondent ordering him to vacate his order denying petitioner's motion for transfer, and ordering him to transfer Criminal Action No. 61-73-D, entitled *United States* v. *Minnesota Mining and Manufacturing Company* to the District of Minnesota.

WRIT OF MANDAMUS AWARDED.

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[3] A trial in the Eastern District of Illinois will result in unjustifiable increased expenses to petitioner of at least $100,000, great inconvenience of witnesses, serious disruption of business and interference of contact between the petitioner's executives and its trial attorneys in connection with protracted antitrust prosecution trial.

Petitioner has no office, plant or other facility in the Eastern District of Illinois.

There is no serious congestion in the docket of the District Court of Minnesota, while a division of the cases pending in the Eastern District of Illinois between the two judges of that district would reveal a considerable case load for both of them.

[fol. 274] HASTINGS, *Chief Judge*, dissenting.

With deference to my distinguished colleagues in the majority, I respectfully dissent from their determination of this original action for writ of mandamus.

It is essential that we first place in proper perspective the particular nature of the offense charged in the indictment returned against petitoner in the case below and on which it presumably will have to stand trial. The only reference thereto in the majority opinion is that it is "Criminal Action No. 61-73-D then pending in said district court."

Petitioner Minnesota Mining and Manufacturing Company, a Delaware corporation, was named as sole defendant in an indictment returned by a federal grand jury sitting in Danville, in the Eastern District of Illinois. The nine-count indictment charges that petitioner and others, named and unnamed, in violation of Sections 1 and 2 of the Sherman Act, 15 U. S. C. A. §§ 1 and 2, have attempted to monopolize, engaged in a combination and conspiracy in restraint of, and conspired to monopolize interstate and foreign commerce in pressure sensitive tapes since 1931 (Counts 1, 2, 3), in magnetic recording media since 1947 (Counts 4, 5, 6) and in aluminum presensitized lithographic plates since 1950 (Counts 7, 8, 9).

The indictment alleges in paragraphs entitled "Jurisdiction and Venue" that the offenses were carried out in part within the Eastern District of Illinois and that petitioner has performed acts in furtherance of the offenses within the Eastern District of Illinois and within five years preceding the return of the indictment.

It is conceded by both parties that venue in the criminal action below would lie not only in the Eastern District of Illinois but also in the Northern District of Illinois and the District of Minnesota, among other federal judicial districts. Indeed, the majority opinion correctly states: "No question of venue is before us. The sole question for respondent [Judge Platt] was whether the transfer to the District of Minnesota would be in the 'interest of justice'."

Petitioner's motion to transfer the case to the District of Minnesota was predicated on Rule 21 (b), Federal Rules of Criminal Procedure, 18 U. S. C. A. which reads:

"(b) Offense Committed in Two or More Districts [fol. 275] or Divisions. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division *and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.*" (Emphasis added.)

Since there is no question of venue before us, respondent in the case below, and this court in the instant original action for writ of mandamus, are concerned solely with the foregoing italicized portion of Rule 21(b).

The plain and simple language of that part of Rule 21 (b) under consideration is that the transfer sought should have been ordered only if respondent was satisfied that it was "in the interest of justice" to do so. This implies an element of discretion in the trial court.

The majority properly recognizes this discretion in the trial court and states that we would not be justified in overruling a denial of transfer unless "there is an abuse of discretion." In view of the extraordinary writ prayed for in the present original action before us, it would be fair to say that such writ should not issue unless we find respondent has erred to the point of a gross or clear abuse of discretion in denying the transfer.

It should be noted that respondent filed a written memorandum setting out in detail his consideration of the motion to transfer. This followed the submission of affidavits, briefs and oral argument by the parties.

In this memorandum respondent listed ten factors he found to be pertinent in the determination of the Rule 21(b) motion. These factors were (1) location of corporate defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8)

relative accessibility of place of trial; (9) docket condition of each district or division involved; and (10) any other special elements which might affect the transfer.

Respondent then discussed each of these factors in detail in his memorandum. While Rule 21(b) does not set out [fol. 276] governing standards, it is undisputed that these are relevant factors properly to be considered by a trial judge in determining a ruling on a transfer motion in a criminal case.

The only mention of respondent's concern about the difficulty of getting a fair and impartial jury in the District of Minnesota was at the conclusion of the memorandum. This is fully set out early in the majority opinion and reference is now made thereto.

My first cause for dissent is that the majority opinion gives no consideration to respondent's treatment of the first nine factors above listed and discussed in detail in his memorandum. Footnote (1) of the majority opinion makes passing reference to such discussion and then concludes that "we are convinced that he saved the most important item for the last. * * * Certainly he was not expressing a minor afterthought."

In the next to last paragraph of the majority opinion appears the only other reference to other factors considered by respondent. In footnote (3), the majority gratuitously makes findings of its own, most of which are contrary to those in respondent's memorandum. The final paragraph in footnote (3) makes a finding with reference to the condition of the dockets in the two districts concerned which I cannot accept. I do not believe the record will support the inference intended to be drawn therefrom.

On balance, I conclude that a consideration of all the factors relied upon by respondent fails to demonstrate any abuse of discretion and certainly none sufficient to justify the issuance of this extraordinary writ.

Relying upon the authority of *Chicago, R. I. & P. R. Co.* v. *Igoe*, 7 Cir., 212 F. 2d 378 (1954), the majority holds that "it is nevertheless true that we may set aside its action if there is an abuse of discretion, *such as its re-*

liance upon an improper factor in determining how the 'interest of justice' would be affected by the proposed transfer." (Emphasis added.)

The "improper factor" found by the majority was the reference made by respondent to petitioner's position of influence in the District of Minnesota and his statement that "[i]t would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois."

[fol. 277] The majority first finds that respondent's action could lead to an abuse "in the selection of what may be deemed a tribunal favorable to the prosecution," citing *United States* v. *Johnson*, 323 U. S. 273, 275 (1944); *Travis* v. *United States*, 364 U. S. 631 (1961); and *United States* v. *Cores*, 356 U. S. 405 (1958). Each of these three decisions are readily distinguishable from the case at bar. They are concerned solely with the determination of the venue of a criminal action and not with what factors are to be considered in determining the "interest of justice." There is no question of venue before us in this proceeding.

The majority concludes that respondent denied petitioner a trial in the District of Minnesota because it "has been an exemplary citizen of that district" and holds this was error, citing the Magna Charta. It is sufficient to say that respondent made no such holding.

The majority follows this with a holding that "it would be an unsound and dangerous innovation in our federal court system for a judge in any district to appraise or even speculate as to the efficacy of the operations of a federal court of concurrent jurisdiction in another district." *I agree.* But, in my judgment, respondent here was not guilty of such an encroachment. I cannot read into respondent's memorandum anything that would justify such a finding and holding by our court.

In the concluding part 4 of the majority opinion, it is expressly held that "this criminal case is impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district * * * [and] we are convinced that this multiple-venue criminal pros-

ecution should be tried in the district of Minnesota, *which is the home of petitioner.*" (Emphasis added.)

If this holding stands and is followed, then in every multiple-venue criminal prosecution under the Sherman Act and kindred statutes, it will mandate transfer to the home district of the defendant, if venue be found there, pursuant to a Rule 21(b) motion.

No authority has been cited as precedent for this holding and we have found none. There is nothing in Rule 21(b) to that effect.

The majority would impress its constitutional concern for trial in a defendant's home district upon Rule 21(b). Laudable as this purpose may be, it is my considered judg- [fol. 278] ment that such an amendment should be left to the legislative branch of the government rather than to engraft it upon the rule through the judicial process.

Finally, I believe the majority has made an unprecedented procedural error in its disposition of this original action. It orders that a writ of mandamus shall issue forthwith directing respondent to vacate his order denying petitioner's motion for transfer and ordering him to transfer the criminal action to the District of Minnesota.

Assuming, *arguendo*, that under the authority of the *Igoe* case respondent relied upon an improper factor in determining the transfer motion, we should direct respondent to vacate the order of denial and reconsider petitioner's motion in the light of the majority holding.

It is suggested that at this stage of the proceeding we have no authority to mandate the transfer sought. In *Igoe*, 212 F. 2d at 382, this court ordered the cause remanded "to the District Court with directions to vacate the order denying the transfer and to reconsider petitioner's motion in the light of the views expressed herein." The court went on to hold:

> "Ultimate decision on that motion is within the province of the District Court, and we cannot, as petitioner would have us do, usurp its function and decide the question in this court."

In *Igoe*, it was not until the remand had been complied with that this court, sitting *en banc*, in a second original

action issued a writ commanding the transfer requested, with one judge dissenting. *Chicago, Rock Island and Pacific Railroad Co.* v. *Igoe*, 7 Cir. 220 F. 2d 299 (1955), cert. denied, 350 U. S. 822.

It is my view, therefore, that in the present posture of this case we are without authority to direct the transfer.

This situation should remind us that we are encouraging parties to make use of this extraordinary procedure to effect an interlocutory review of a discretionary order. The experience of our court in recent years affords a firm conviction that "repetitive invocations of mandamus" are improperly becoming a way of appellate life.

I am in accord with the views of my Brother Castle, so well expressed in his recent dissent in *Chesapeake & Ohio* [fol. 279] *Railway Company* v. *Parsons*, 7 Cir., 307 F. 2d 924, 926-28 (1962), cert. granted, ... U. S. .....,

I would deny the writ of mandamus sought in this proceeding.

[fol. 280]

IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

* * * *

Before

Hon. JOHN S. HASTINGS, Chief Judge
Hon. F. RYAN DUFFY, Circuit Judge
Hon. ELMER J. SCHNACKENBERG, Circuit Judge

No. 13902

MINNESOTA MINING AND MANUFACTURING COMPANY, PETITIONER,

vs.

HONORABLE CASPER PLATT, Chief Judge, United States District Court for Eastern District of Illinois, RESPONDENT.

Petition for Writ of Mandamus.

JUDGMENT—February 27, 1963

This matter comes before the Court on the petition of Minnesota Mining and Manufacturing Company for a writ of mandamus, the answer of respondent thereto filed pursuant to a Rule To Show Cause heretofore issued by this Court, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that a writ of mandamus issue forthwith directed to respondent, the Honorable Casper Platt, Chief Judge of the United States District Court for the Eastern District of Illinois, ordering him to vacate his order entered on August 31, 1962, denying petitioner's motion for transfer, and ordering him to transfer criminal action No. 61-73-D, entitled *United States* v. *Minnesota Mining and Manufacturing Company*, to the District of Minnesota, in accordance with the opinion of this Court filed this day.

* * * *

[fol. 281-282] * * *

[fol. 283]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 284]

IN SUPREME COURT OF THE UNITED STATES

[Title Omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—March 28, 1963

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 29, 1963.

/s/ Tom C. Clark
Associate Justice of the Supreme Court of the United States.

Dated this 28th day of March, 1963.

[fol. 285]

SUPREME COURT OF THE UNITED STATES

No. 1064, October Term, 1962

HON. CASPER PLATT, Chief Judge, United States District Court, Eastern District of Illinois, PETITIONER

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY

ORDER ALLOWING CERTIORARI—June 17, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1963 697982 144

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS, PETITIONER

v.

MINNESOTA MINING AND MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Honorable Casper Platt, Chief Judge of the United States District Court for the Eastern District of Illinois, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on February 27, 1963.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, pp. 19–38) has not yet been reported.[1]

[1] The Appendix to this petition is cited "App. —". The appendix filed by Minnesota Mining in the court of appeals

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1963. On March 28, 1963, Mr. Justice Clark granted an extension of 30 days within which to file a petition for a writ of certiorari to and including April 29, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

A motion under Rule 21(b) of the Federal Rules of Criminal Procedure to transfer a multi-venue Sherman Act case to the district of the corporate defendant's headquarters was denied by the district court on the ground that transfer was not in the "interest of justice." On mandamus, the court of appeals held that it was improper for the district court to consider, as one element in its determination, the difficulty of selecting an impartial jury in the district of the defendant's headquarters. The court of appeals then issued a writ of mandamus ordering transfer to that district. The questions presented for review are:

1. Whether the court of appeals, having concluded that one of several factors relied upon by the district judge was an improper consideration, should thereupon have remanded the case to the district judge with instructions to exercise his discretion in light of a proper standard, rather than ordering a transfer on the basis of the reviewing court's own *de novo* findings and evaluation of the facts.

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is cited "Pet App. —"; the appendix filed by Judge Platt in the court of appeals is cited "R. App.—".

2. Whether district judges, in determining whether a transfer would be in the "interest of justice" under Rule 21(b), are required to give heavy or dispositive weight to the fact that the proposed transferee district is the headquarters, or "home district," of a corporate defendant.

RULE INVOLVED

Rule 21(b) of the Federal Rules of Criminal Procedure provides:

> **Offense Committed in Two or More Districts or Divisions.** The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

STATEMENT

Upon receipt of a complaint that Minnesota Mining & Manufacturing Co. (Minnesota Mining) had violated the antitrust laws in the Eastern District of Illinois, a grand jury investigation was instituted in that district at Danville in October 1958 (Pet. App. 64). After an extended investigation, the Danville grand jury returned a nine-count indictment on December 13, 1961, charging Minnesota Mining with violating the antitrust laws by attempting and conspiring to monopolize pressure-sensitive tape, magnetic recording media (the subject matter of the initial complaint) and aluminum presensitized litho-

graphic plate (Pet. App. 101–124). The alleged violations were nation-wide and the government conceded, before any motion to transfer was made, that the case could have been filed in a number of other districts, including the Northern District of Illinois—where the office of the Antitrust Division in immediate charge of the investigation was located—and the District of Minnesota—where the defendant, a Delaware corporation, has its principal office (Pet. App. 132).

On March 7, 1962, the defendant moved the trial judge, Chief Judge Casper Platt (petitioner), to transfer the action to the District of Minnesota on the ground that such a transfer "would be in the interest of justice" (Pet. App. 14). The principal facts relied upon, as set forth in affidavits attached to the motion, were the following:

(a) The defendant's general and administrative offices, its research laboratories, and a large number of its manufacturing plants were located in or near St. Paul, and none of its 20 branch sales offices was located in the Eastern District of Illinois (Pet. App. 16).

(b) Numerous documents subpoenaed by the grand jury were examined by representatives of the Antitrust Division at St. Paul, and selected documents were then delivered to the Division's Chicago Office, together with about 15,000 other documents obtained in prior investigations (Pet. App. 16–17).

(c) Defendant's copies of these documents were located in the office of its general counsel at St. Paul or in the office of its trial counsel at Chicago (Pet. App. 18).

(d) An adequate defense would require the immediate availability at the trial of sixteen officers residing at St. Paul (Pet. App. 20).

(e) Trial at St. Paul would eliminate the need for local counsel other than the attorneys in the office of Minnesota Mining's general counsel (Pet. App. 21).

(f) Substantial additional expense would be incurred in on-the-scene preparation and trial of the case in Danville as against St. Paul (Pet. App. 22).

(g) No competitor or alleged co-conspirators maintained a principal place of busines in the Eastern District of Illinois, nor were any meetings between the defendant and the alleged co-conspirators held there (Pet. App. 23–24).

(h) The trial of the case in Minneapolis or St. Paul would have encountered no delay, as the district court dockets in those cities were current (Pet. App. 24).

The government filed counter-affidavits in which it relied upon the following facts:

(a) The District of Minnesota was not one of the forums selected by the defendant for the trial of a substantial number of patent infringement suits involving the same subject matter embraced by this indictment, although in a number of cases venue lay in the District of Minnesota (R. App. 64–65).

(b) In one of the infringement suits defendant chose to lay the venue in the Eastern District of Illinois and it resulted in a four-week trial at East St. Louis (R. App. 63–65; Pet. App. 66).

(c) In view of the defendant's 1961 gross sales of $608,000,000 and earnings in excess of $70,000,000,

there was no danger that the added expense of trial in Danville would impair the quality of the defense.

(d) A number of residents of the Eastern District of Illinois would be called as witnesses on behalf of the plaintiff, and Danville, which is approximately ninety miles south of Chicago and approximately the same distance north of St. Louis, was substantially closer and more convenient than St. Paul for the majority of the key government witnesses (Pet. App. 67).

(e) A "speedy" trial was essential because the return of the indictment had not put an end to the alleged illegal conduct (Pet. App. 68).

Extensive arguments, held June 14 and August 21, 1962, fully explored the relative chances for a prompt trial in the Minnesota and Danville District Courts. There was also argument and further evidence as to the relative convenience of the parties, their counsel and their witnesses.

In the course of his initial oral argument, counsel for defendant asserted that trial in Danville would be "unfair" to the defendant and that a transfer to St. Paul was needed to assure "a fair trial to the defendant" (Pet. App. 150). At that point the court inquired as to problems of jury selection that might arise because of the extremely large number of Minnesota Mining employees and stockholders residing in the Minneapolis-St. Paul area. Accordingly, counsel for the defendant supplied the court with a total figure of 17,153 stockholders and non-stockholder employees in Ramsey County, where St. Paul is located, and 5,425 in Hennepin County, where Minneapolis is located (Pet. App. 99). The court, at the hearing on

August 21, agreed with counsel for the defendant that all of these individuals could be challenged by the government and excluded for cause (R. App. 91). In explaining why this concentration of disqualified potential jurors near St. Paul would not prevent a fair trial, defendant's counsel pointed out that the St. Paul court undoubtedly would exclude these individuals from the jury and, in order to prevent selection of a jury "sympathetic" to the defendant, could draw its members entirely from the rest of the District (R. App. 91).

On August 31, 1962, Judge Platt filed a memorandum and order denying the transfer (Pet. App. 3–13). In the memorandum the court examined and discussed ten factors raised by defendant in its motion, taking into consideration the facts set out in the affidavits, briefs, and oral argument. It noted, *inter alia*, that the docket in Danville, without a doubt, would provide an earlier trial than the docket in the Minnesota District; that those witnesses who are officers or employees of the defendant would find it more convenient if the case were transferred to St. Paul, but that Danville (according to the government's affidavit) was substantially closer and more convenient for the majority of the key government witnesses; that it was difficult to determine, without the disclosure of evidence, where the greater number of the negotiations involved in the litigation had taken place; that while it would be inconvenient for the defendant to transport to Danville those documents, necessary to trial, which are located in St. Paul, there was no claim that such

documents were indispensable to the day-to-day operation of defendant's business; that a trial in Minnesota would require the government to transfer nine heavy corrugated boxes containing more than 15,000 documents; that in view of the size of defendant's operations and the number of its plants and their locations, the disruption to defendant's business which would result from trial in Danville, although greater than would be entailed by trial at St. Paul, should not be substantially greater; that a trial in Danville would be more expensive to defendant than a trial in St. Paul but would be less expensive to the government; and that while defendant's legal department and retained patent lawyers are located in St. Paul, Danville would be more easily accessible to the government attorneys and Minnesota Mining's outside attorneys, all of whom reside in Chicago.

The memorandum concluded with a section entitled "Special Elements of Hardship." Under that heading, Judge Platt first found that the Chairman of the Board of Minnesota Mining, a gentleman of advanced age, would not be more severely taxed by a Danville trial than by a St. Paul trial (Pet. App. 11–12) (a contention first made by defense counsel in oral argument). Finally, as "one other item which cannot be overlooked," the court stated that in view of defendant's extensive activities in the St. Paul-Minneapolis area and the large number of contacts that its employees and stockholders had made there, "[i]t would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois."

Alleging that Judge Platt had exceeded the permissible limits of his discretion in denying the requested transfer, the defendant petitioned the Court of Appeals for the Seventh Circuit to issue a writ of mandamus compelling the transfer. This allegation was based chiefly on the claim that Judge Platt had denied the transfer on the ground that it would be difficult for the government to obtain a fair trial in the Minnesota District. The court of appeals issued a rule to show cause why the writ should not issue.

In his answer, Judge Platt stated:

> This respondent gave consideration to all factors urged by petitioner and found several which militated against transfer. It appeared to respondent that the trial of the case would be delayed at least a year by the transfer, and the Government avowed a speedy trial was essential because some of petitioner's competitors are in financial straits owing to petitioner's alleged conduct and to the fact that petitioner has refused to halt its allegedly illegal activities; that the Government's witnesses may be inconvenienced if forced to travel to the northern city of St. Paul, Minnesota; that the Government's documents are already in Danville in the custody of the Clerk of the Court and would have to be transported to St. Paul; that transfer would increase the Government's expense because its witness' fees would be greater, as would cost of transportation of the Government's staff; that it would be more difficult for the Government to get an impartial jury in St. Paul than in Danville. It further appeared to respondent that petitioner has operated on a nation-wide scale in its business of licensing and

> selling in the industries here involved; that there is support for the Government's avowal that petitioner's overt acts have substantially affected the residents of the Eastern District of Illinois; that this is not an "imported" case; and that, considering all the evidence and facts in the over-all, trial in the Eastern District of Illinois would be in the "interest of justice." (Answer, pp. 3–4, par. 6).

As a footnote to the statement that "it would be more difficult for the Government to get an impartial jury in St. Paul than in Danville," Judge Platt noted that "both sides are entitled to a fair jury and obstacles thereto adversely affect the 'interest of justice'." Judge Platt emphasized, moreover, that the fact that it would be more difficult for the government to obtain an impartial jury in the District of Minnesota had not been the sole or main ground for denying transfer; rather, it "was but one of a number of factors" which led him to his conclusion (Answer, p. 2, par. 3).

On February 27, 1963, the court of appeals, Chief Judge Hastings dissenting, granted the petition and ordered Judge Platt to transfer the case to Minnesota forthwith (App. 19–38). The court held that it was improper for Judge Platt to have taken into consideration the difficulty of obtaining an impartial jury in the District of Minnesota, and it stated that it deemed this factor the most important element in his decision. In addition, the court of appeals declared that the government would *not* receive a speedier trial in Danville than in St. Paul, and that "[a] trial

in the Eastern District of Illinois will result in unjustifiable increased expenses to petitioner of at least $100,000, great inconvenience of witnesses, serious disruption of business and interference of contact between the petitioner's executives and its trial attorneys in connection with protracted antitrust prosecution trial." (App. 31.) Finally, the court stated that

> * * * in addition to the demonstration by proof or admission of the essential elements of convenience, expense and early trial, constituting "interest of justice" in a civil case * * * this criminal case is impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district. * * * [App. 30–31].

Chief Judge Hastings, in dissent, pointed out that acceptance of the latter doctrine would compel transfer of every multiple-venue Sherman Act prosecution to the district of the defendant's main office (App. 36–37). He also stated that the court of appeals had no power to order transfer itself and should instead have directed Judge Platt to reconsider the motion (App. 38).

In the court of appeals, attorneys of the Department of Justice represented the petitioner. The petitioner has requested the Solicitor General and the Department to represent him before this Court and to file a petition for a writ of certiorari in his behalf.

REASONS FOR GRANTING THE WRIT

This case presents an important question of judicial administration involving the manner in which a court

of appeals may use the extraordinary writ of mandamus to review and control the exercise of a district court's discretion in refusing to transfer a criminal case under Rule 21(b), F.R. Crim. Proc. The issue is whether the court of appeals, having ruled that one of many factors relied upon by the district court was an improper consideration, was justified in ordering the transfer on the basis of its own *de novo* findings and evaluation of the facts, or whether, after the error was laid bare, it should, in accordance with established judicial procedure, have remanded the case to the district court for reconsideration under a proper standard.[2]

1. Here the district judge—taking into account all of the facts set out in the affidavits, briefs, and oral argument—thoroughly canvassed ten factors urged by Minnesota Mining as criteria for determining its motion. Among these factors, he found several which militated against transfer: the fact that the docket in Danville would "without a doubt" provide an earlier trial; that the overwhelming majority of the government's witnesses lived closer to Danville than to St. Paul, and would be inconvenienced by a transfer; that the government's documents—more than 15,000 in number—were already in the custody of the clerk of court in Danville and, if the motion were granted, would have to be transported; that transfer would increase the government's expense, chiefly by requiring higher witness fees; and that Danville was more easily acces-

[2] We do not seek review of the correctness of the Seventh Circuit's holding that it was impermissible to take into account the difficulty of assembling an unbiased jury.

sible to all of the government's attorneys, and also to defendant's outside counsel. Only at the very end of his memorandum opinion—in a section entitled "Special Elements of Hardship"—did Judge Platt refer to the difficulties attendant upon the selection of a jury in the transferee forum, and, even then, only as "one other item which cannot be overlooked."[3] In his personally signed response to the rule to show cause, he further stated that it was "incorrect" to refer to the difficulty of securing an impartial jury in Minnesota as the "sole" or "main" ground of his decision, and that this "was but one of a number of factors." And he specifically reiterated the several elements which had led him to the conclusion that a transfer should not be granted. Thus, there is every indication that even had petitioner altogether excluded from consideration the "impartial jury" point, he would still have denied the transfer.

Under these circumstances, it was plainly incumbent upon the court of appeals, having ruled out the consideration it deemed improper, to remand the case to the district court with directions to reconsider the transfer motion in light of its decision. Indeed, the

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[3] We find no basis for the assertion of the majority of the court of appeals that the district court "believed that there was a likelihood of the government not receiving a fair jury trial in Minnesota" (App. 26). Judge Platt did not suggest that the government could not get a fair trial if proper precautions were taken in selecting a jury, or that proper precautions would not be taken. He simply pointed out that the selection of impartial jurors would be "more difficult," and we see no reason why this finding should not be taken at face value, especially since it was "but one of a number of factors" which he took into account (Answer, p. 2, par. 3).

Seventh Circuit itself has recognized, in setting aside a refusal to transfer under the Federal Rules of Civil Procedure, that "Ultimate decision on that motion is within the province of the District Court, and we cannot * * * usurp its function and decide the question in this court." *Chicago, R.I. & P.R. Co.* v. *Igoe,* 212 F. 2d 378, 382 (1954). Here, however, the court of appeals, brushing aside Judge Platt's painstaking enumeration of the discretionary factors which had led him to deny transfer, proceeded to make its own findings—including a finding, squarely contrary to the evidence, that docket congestion was greater in Danville than in Minnesota[4]—and to reach its own conclusion that the balance of conveniences favored transfer. Even by the standards applicable to ordinary appeals, it would be highly improper for a reviewing

[4] The court of appeals stated in a footnote to its opinion that: "There is no serious congestion in the docket of the District Court of Minnesota, while a division of the cases pending in the Eastern District of Illinois between the two judges of that district would reveal a considerable case load for both of them." (App. 31.)

This statement is obviously based on defendant's evidence that the average case load per judge in the District of Minnesota was 141.5, while the average case load per judge in the Eastern District of Illinois was 163.5 (Pet. App. 58). These statistics were completely discredited by the government's evidence which showed that unlike the District of Minnesota, where the cases are pooled and assigned to judges only as they have openings, cases in the Eastern District of Illinois are kept on separate calendars at Danville and East St. Louis, Illinois. Those filed at Danville are heard by Chief Judge Casper Platt; those filed in East St. Louis, Illinois, are heard by Judge William G. Juergens (Pet. App. 82). The evidence showed that Judge Platt's case load at Danville was only 92 civil cases and 2 criminal cases (of which one was the instant case against Minnesota Mining) (Pet. App. 82–83).

court thus to substitute its judgment for the judgment of a district judge in a matter in which he is vested with broad discretion to weigh many competing considerations. But the impropriety is compounded where the court action is by mandamus, a remedy which is available "* * * only in the exceptional case where there is clear abuse of discretion or usurpation of judicial power * * *", *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383. By its action here the court of appeals usurped the discretion of the district judge, abused the writ of mandamus, and departed from the accepted course of judicial proceedings.

2. The court of appeals, in the penultimate paragraph of its opinion, declared that in addition to the defendant's demonstration of the essential elements of convenience, expense and early trial, "this criminal case is impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district * * *. Consequently, we are convinced that this multiple-venue criminal prosecution should be tried in the district of Minnesota, which is the home of [Minnesota Mining]." (App. 31.)

In dissenting, Chief Judge Hastings construed the majority opinion as holding that all multi-venue criminal prosecutions must, under Rule 21(b), be transferred to the "home district of the defendant" (App. 37)—in the case of a corporation, its headquarters.* It

*The home of a corporation for venue purposes is the State of incorporation, in this case Delaware. This fact, without more, makes the court's equation of main office location with "home district" for venue purposes a conspicuous anomaly.

is not clear whether the opinion actually goes so far as to hold that transfer to a "home district" is mandatory in every case where venue lies in that district—a possibility which might explain the court's refusal to remand for reconsideration. If it does so hold, the opinion is egregiously wrong and constitutes a dangerous and far-reaching precedent, as its effect would be to substitute a rigid mechanical rule for the flexible balancing of interests which Rule 21(b) has always been thought to contemplate. And even if the decision below does not lay down such an absolute rule, the special emphasis it places upon the "home district" factor is likely to have an important and misleading influence upon district courts in determining motions under Rule 21(b).

The alleged "historical right" of a defendant to be prosecuted at his district of residence simply does not exist. At common law the term "vicinage" refers to the place where the crime was committed, not where the defendant lived. 4 Blackstone, *Commentaries*, pp. 303–304; Blume, *The Place of Trial in Criminal Cases*, 43 Mich. L. Rev. 59 (1944). And the reference to "vicinage" in the Magna Carta is not, as a matter of history, inconsistent with the common law and constitutional provision that venue is proper, and trial may be had, in the district where the crime was committed, notwithstanding that the defendant's home is in another district. *In re Palliser*, 136 U.S. 257, 265.

Rather clearly, the court of appeals confused and telescoped two quite different doctrines: (a) the principle that trial must, under the Constitution, be held

where the crime is committed (Art. 3, Sec. 2, and the Sixth Amendment); and (b) the notion, introduced for the first time in federal jurisprudence by Rule 21(b), that convenience is a factor entitled to recognition, in fixing the place of trial. Its error is bound to be unsettling and disruptive in multi-venue criminal cases, and since orders to transfer are plainly interlocutory, the government is unlikely, in future proceedings, to be in a position to seek review by this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

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Attorneys.

APRIL 1963.

APPENDIX

In the United States Court of Appeals for the Seventh Circuit

No. 13902 SEPTEMBER TERM, 1962 JANUARY SESSION, 1963

MINNESOTA MINING AND MANUFACTURING COMPANY, A DELAWARE CORPORATION, PETITIONER

v.

HON. CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS, RESPONDENT

Petition for Writ of Mandamus

February 27, 1963

Before HASTINGS, *Chief Judge*, DUFFY AND SCHNACKENBERG, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Petitioner, Minnesota Mining and Manufacturing Company, a Delaware corporation, having filed in this court its petition for the issuance of a writ of mandamus directed to Honorable Casper Platt, Chief Judge of the United States District Court for the Eastern District of Illinois, respondent, commanding him to vacate an

order which he entered on August 31, 1962, denying petitioner's motion under 18 U.S.C.A. Rule 21(b) of the Federal Rules of Criminal Procedure, to transfer Criminal Action No. 61-73-D then pending in said district court, to the district court in the District of Minnesota, described as the home district of petitioner, the sole defendant in that proceeding, and also commanding him to transfer the action to the said District of Minnesota, we ordered respondent to show cause why the writ should not issue as prayed.

In his answer respondent informed us that he held hearings and that, after examining all the relevant factors, he was not satisfied the petitioner had established that the "interest of justice" would be promoted by the transfer.

In a memorandum accompanying his order, respondent discussed the term "in the interest of justice" and completed an analysis of the facts produced before him, by stating:

> "There is one other item which cannot be overlooked in passing upon this motion. *For more than 50 years 3M has had many employees and stockholders in the St. Paul area. 3M has grown from a small corporation to an industrial giant while located in the St. Paul area.* Its officers and employees have been active in civic affairs. They hold official positions in over thirty-three financial, civic, and educational institutions. All of these activities are to the credit of 3M, but at the same time when one considers the number of contacts that its employees and stockholders have made over the area, and the pride that the community in that area would have, and should have, in 3M, there might exist a very severe influence on any citizen in the area called for jury service. It also must be noted that the charge in the indictment is a misdemeanor, and that the Government and the defendant each have but three

peremptory challenges. Rule 24(b), Federal Rules of Criminal Procedure, 18 U.S.C.A. Counsel for the defendant, in his argument, has made the suggestion that the jury might be drawn from outside the counties of Ramsey and Hennepin where there isn't the concentration of officers, employees, and stockholders of 3M. The influence of 3M and its personnel would probably make itself felt among the citizens in the counties adjacent to Ramsey County where St. Paul is located and to Hennepin County where Minneapolis is located. *These facts are material in determining where the cause should be tried.* See *United States* v. *Hoffa*, D. C. S. D. Fla., 1962, 205 F. Supp. 710, 722. *It would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois.*

"This Court has carefully reviewed the facts and circumstances relating to the transfer of this case 'in the interest of justice.' Some facts mentioned by counsel have not been noted in order not to lengthen this memorandum. The Court has concluded that 'in the interest of justice' the cause should be tried in the Eastern District of Illinois." (Italics supplied.)

In his answer, respondent asserts that his

"* * * conclusion that it would be more difficult for the Government to obtain an impartial jury in the District of Minnesota * * * was but one of a number of factors, * * * which led respondent to this conclusion. * * *"[1]

[1] While respondent in his memorandum and order referred to the alleged difficulty of getting a fair and impartial jury in the Minnesota district, after he had discussed the other matters considered relevant to a transfer, we are convinced that he saved the most important item for the last. He did admit that the facts pertaining thereto were material in determining where the cause should be tried. Certainly he was not expressing a minor afterthought.

1. Rule 21(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., provides:

> "* * * The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

It was stipulated that venue for the offense charged in the indictment lay in both the Eastern District of Illinois and the District of Minnesota. Therefore, it was the duty of the court to transfer the case to the District of Minnesota if it was satisfied that in the "interest of justice" the proceedings should be transferred. No question of venue is before us. The sole question for respondent was whether the transfer to the District of Minnesota would be in the "interest of justice".

While we would not be justified in overriding a denial of transfer based upon a valid exercise by the court of its discretion, it is nevertheless true that we may set aside its action if there is an abuse of discretion, such as its reliance upon an improper factor in determining how the "interest of justice" would be affected by the proposed transfer. *Chicago, R. I. & P. R. Co.* v. *Igoe*, 212 F. 2d 378; 220 F. 2d 299.

The courts have repeatedly recognized the considerations of historic experience and policy which underlie those safeguards in the Constitution against opening the door to needless hardship to an accused by prosecution remote from home and from appro-

priate facilties for defense. It has been pointed out that such leeway leads to the appearance of abuses if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution, *United States* v. *Johnson,* 323 U.S. 273, 275. At 276, the court said:

> "These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests. These are important factors in any consideration of the effective enforcement of the criminal law. They have been adverted to, from time to time, by eminent judges; and Congress has not been unmindful of them. Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

At 277, the court distinguished a provision of the Elkins Act relied on in *Armour Packing Co.* v. *United States,* 209 U.S. 56, which made a venue provison dependent upon transportation of goods, not their sending or bringing, pointing out that transportation is a continuing phenomenon. Transportation is not a critical element in the case at bar.

In *Travis* v. *United States,* 364 U.S. 631, 634 (1961), the court explicitly admitted awareness that the venue provisions in acts of Congress should not be so freely construed as to give the Government the choice of "a tribunal favorable" to it.

In 1958, the Supreme Court, in determining the proper venue in a criminal case, *United States* v. *Cores*, 356 U.S. 405, said, at 407:

> "* * * In ascertaining this locality we are mindful that questions of venue 'raise deep issues of public policy in the light of which legislation must be construed.' *United States* v. *Johnson*. * * *"

2. At the hearing on petitioner's motion for transfer, the facts related in the italicized portion of respondent's memorandum, *ante* 2, were established either by affidavits, a letter of petitioner's attorney addressed to respondent, or an answer by petitioner's attorney to a question put in open court. Furthermore, we believe that the statement that its officers and employees have been active in civic affairs is a reasonable inference. However, aside from a mere unsworn statement by government counsel, there is no evidentiary basis for the statement that they held official positions in over 33 financial, civic and educational institutions. We do infer and believe that it would be probable that they would be active in such manner to some degree. We draw from these facts, for the purpose of argument, every reasonable inference to support the denial of transfer to the District of Minnesota, and yet we arrive at the conclusion that petitioner has been an exemplary citizen of that district. We cannot agree that, for that reason, it is not entitled to be tried in the vicinage of its home office. Otherwise we would be arbitrarily denying to it a right first established in 1215, when the Magna Charta was wrung from the hands of King John at Runnymede.

3. In this case, we are also confronted with the question as to whether a district court, created for and sitting in the State of Illinois, may assume the function of deciding whether, in the criminal case at

bar, it would be difficult to get a fair and impartial jury if the case were transferred, as prayed by petitioner in reliance on rule 21(b), to a Minnesota district, where petitioner has from a small beginning grown to be a large corporation with many employees and stockholders living in the area. Briefly stated, when venue exists in both the Illinois and Minnesota districts, is it permissible for a district court in Illinois to make a determination in the "interest of justice" under rule 21(b) to the effect that it would be difficult for the government to procure a fair trial in the District of Minnesota? We have been cited to no Federal case so holding.

The underlying spirit of the constitutional concern for trial in the vicinage of the defendant, rooted in centuries of Anglo-Saxon jurisprudence and universally recognized by the federal courts, is not to be ignored. Instead, the lack of such a case is emphasized by the ineffectual efforts of respondent's counsel to justify his action in this case. Thus he cites *United States* v. *Hoffa*, 205 F. Supp. 710, 722 (S. D. Fla. 1962), where a district court transferred a criminal case for the purpose of trial to another division of the Southern District of Florida under rule 21(a). However, the ground for transfer was the court's opinion that the facts presented naturally tended to create an atmosphere which might present some difficulty in selecting an impartial and unbiased jury in the transferror court. In so doing, it was passing upon conditions in the district of the court which was making the transfer. It did not assume to pass upon whether a court in another judicial subdivision would or might be able to procure a fair jury or grant a fair trial.

While the opinion of the district court in the case at bar does not explicitly state that a fair and impartial

jury could not be obtained in the Minnesota District, and merely says that it would be more difficult to do so than in the Eastern District of Illinois, the only meaningful purpose which can be attributed to the language used is that the court believed that there was a likelihood of the government not receiving a fair jury trial in Minnesota. However, a belief of a difficulty which might be encountered in procuring unprejudiced veniremen would not justify a refusal to make a transfer otherwise proper under rule 21(b), because no court is in a position to pass upon the qualifications of jurors, except by considering their *voir dire* examination. Thus, in *Irvin* v. *Dowd*, 366 U.S. 717, 722, the court said:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. *To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.* It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. * * *" (Italics supplied.)

In *Beck* v. *Washington*, 369 U.S. 541, 557, the Supreme Court, having before it the *voir dire* examination at the trial of the defendant, said:

> "A study of the *voir dire* indicates clearly that each juror's qualifications as to impartiality far exceeded the minimum standards this

> Court established in its earlier cases as well as in *Irvin* v. *Dowd*, 366 U.S. 717 (1961), on which petitioner depends. * * *"

Among the cases holding that, upon a motion under rule 21(a) to transfer a criminal case, because of the claimed prejudice against defendant that he cannot obtain a fair trial, *"the proper occasion for such a determination is upon the voir dire examination"*, are *United States* v. *Kline*, 205 F. Supp. 637, 640 (D. Minn. 1962), and *Blumenfield* v. *United States*, 8 Cir., 284 F. 2d 46, 51 (1960).

Respondent relies on certain dictum in *Kirk* v. *Spur Distributing Co.*, 95 F. Supp. 428 (D. Del. 1950). Plaintiff, a resident of Arkansas, brought suit in the federal district court in Delaware, against the corporate defendant, which existed under the laws of that state. He had theretofore brought a suit in a state court in Arkansas against the same defendant, but, when the case had proceeded to the point of summation to the jury, he took a voluntary nonsuit. In the federal court in Delaware, plaintiff resisted a motion to transfer the case to the United States District Court for the Eastern District of Arkansas, because "he cannot obtain a fair trial in Helena, Arkansas" and "it is not 'in the interest of justice' to transfer plaintiff to a place where he cannot obtain a fair trial". The district judge commented that plaintiff's statement "is such a severe indictment of a court of justice that the mere ipse dixit to that effect cannot alone be accepted, but we must look to the supporting facts". These "supporting facts" tended to show that racial antagonism was alleged to have been the underlying cause of plaintiff's trouble which culminated in the first suit being filed. The district judge in Delaware considered affidavits offered by plaintiff and by defendant, including those executed by counsel

and clerks of the courts in Arkansas, both state and federal. He then decided that these affidavits set out no prejudice or bias that would or could exist for either reason assigned by plaintiff.

According to the district judge, the affidavit of the presiding judge in the former trial set out:

> "that every juror was thoroughly examined for the purpose of ascertaining whether there was any bias or prejudice; that the jury finally selected to try the cause was acceptable by counsel for the respective parties litigant; that the jury finally selected was composed of businessmen of Phillips County whose integrity and honesty was above reproach; that during the entire trial of said cause there was no evidence offered, directly or indirectly, which would show or infer any malice, bias or prejudice for or against the parties litigant; that there was no question of racial prejudice involved or concerned in this trial * * * and that there was no malice, bias or prejudice displayed either by the Court officials or jurors during the trial of the cause."

The district judge concluded, at 431, that there was no evidence of unfairness in the former trial.

Nevertheless plaintiff persisted that he could not obtain a fair trial in Phillips County, Arkansas, with a jury drawn from that vicinity. The district court pointed out that the district had a population of over 200,000 and said, at 431:

> "* * * For one to say that from that number an impartial and unprejudiced jury cannot be drawn is to state an extreme position. But even with this population the plaintiff might still think that a minimum of jurors from Phillips County and a trial at Helena would still prevent a fair and impartial trial.
>
> "The affidavit of the counsel for the plaintiff pays high tribute to the United States Judge

presiding in the Division to which it is sought to transfer this case. The affidavit states, 'I also wish to state that I feel that if the case is transferred to the United States District Court for the Eastern Division of the Eastern District of Arkansas and tried at Helena without a jury that both parties would receive a fair and impartial trial and that no prejudice would exist against either party.'

"It seems hardly necessary for me to point out that both the place of trial and composition of the jury may largely be safeguarded by the judge *who is thus shown so acceptable.*" (Italics supplied.)

After calling attention to 28 U.S.C.A. § 1404(c), which provides "A district court may order any civil action to be tried at any place within the division in which it is pending", and 28 U.S.C.A. § 1865(a), which states that petit jurors "shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial", *the district judge stated that he was of the opinion that the case should be transferred to the Arkansas federal court.*

The *Kirk* case not only fails to support respondent's position in the case at bar, but it is an illuminating illustration of the impropriety of vesting any district judge with authority to assess the quality of justice which he foresees may be meted out by a federal court in another district. If, in passing on a motion to transfer a case to another district, a court may consider affidavits tending to establish the high tribute paid to a presiding judge of the latter district, it could consistently be argued that he could also consider affidavits or other proof impugning the standing and qualifications of such a judge. Thus the ability of a transferee court to afford a fair trial, to the extent that it was thought to depend on the qualifica-

tions of the presiding judge thereof, would be open to judicial scrutiny and assessment by a court of another district.

We believe it would be an unsound and dangerous innovation in our federal court system for a judge in any district to appraise or even speculate as to the efficacy of the operations of a federal court of concurrent jurisdiction in another district. It follows that no order in any way based upon such reasoning can stand, even under the guise of an exercise of discretion.

4. While, in acting on a motion to transfer under rule 21(b), a district court has a broad discretion, yet the determination of the requirements of "the interest of justice", should be given primary consideration. Thus, in *Igoe*,[3] at 303, we said:

> "* * * In the interest of justice there should be considered the relative ease of access to sources of proofs; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; * * * and the state of the court calendar both in the District where the case is pending, and in the District to which it is sought to have the case transferred."

But, in the case at bar, in addition to the demonstration by proof or admission of the essential elements

[3] 220 F. 2d 299, 303.

of convenience, expense and early trial, constituting "interest of justice" in a civil case[*] as outlined in *Igoe*, this criminal case is impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district, as we have pointed out, *ante* 5. Consequently, we are convinced that this multiple-venue criminal prosecution should be tried in the District of Minnesota, which is the home of petitioner.

For the reasons herein set forth, a writ of mandamus will issue forthwith, directed to respondent, ordering him to vacate his order denying petitioner's motion for transfer, and ordering him to transfer Criminal Action No. 61–73–D, entitled *United States* v. *Minnesota Mining and Manufacturing Company* to the District of Minnesota.

WRIT OF MANDAMUS AWARDED.

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[*] A trial in the Eastern District of Illinois will result in unjustifiable increased expenses to petitioner of at least $100,000, great inconvenience of witnesses, serious disruption of business and interference of contact between the petitioner's executives and its trial attorneys in connection with protracted antitrust prosecution trial.

Petitioner has no office, plant or other facility in the Eastern District of Illinois.

There is no serious congestion in the docket of the District Court of Minnesota, while a division of the cases pending in the Eastern District of Illinois between the two judges of that district would reveal a considerable case load for both of them.

HASTINGS, *Chief Judge,* dissenting.

With deference to my distinguished colleagues in the majority, I respectfully dissent from their determination of this orignal action for writ of mandamus.

It is essential that we first place in proper perspective the particular nature of the offense charged in the indictment returned against petitioner in the case below and on which it presumably will have to stand trial. The only reference thereto in the majority opinion is that it is "Criminal Action No. 61–73–D then pending in said district court."

Petitioner Minnesota Mining and Manufacturing Company, a Delaware corporation, was named as sole defendant in an indictment returned by a federal grand jury sitting in Danville, in the Eastern District of Illinois. The nine-count indictment charges that petitioner and others, named and unnamed, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 and 2, have attempted to monopolize, engaged in a combination and conspiracy in restraint of, and conspired to monopolize interstate and foreign commerce in pressure sensitive tapes since 1931 (Counts 1, 2, 3), in magnetic recording media since 1947 (Counts 4, 5, 6) and in aluminum presensitized lithographic plates since 1950 (Counts 7, 8, 9).

The indictment alleges in paragaphs entitled "Jurisdiction and Venue" that the offenses were carried out in part within the Eastern District of Illinois and that petitioner has performed acts in furtherance of the offenses within the Eastern District of Illinois and within five years preceding the return of the indictment.

It is conceded by both parties that venue in the criminal action below would lie not only in the Eastern District of Illinois but also in the Northern District of Illinois and the District of Minnesota, among other federal judicial districts. Indeed, the majority opinion correctly states: "No question of venue is before us. The sole question for respondent [Judge Platt] was whether the transfer to the District of Minnesota would be in the 'interest of justice'."

Petitioner's motion to transfer the case to the District of Minnesota was predicated on Rule 21(b), Federal Rules of Criminal Procedure, 18 U.S.C.A. which reads:

> "(b) Offense Committed in Two or More Districts or Divisions. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division *and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.*" (Emphasis added.)

Since there is no question of venue before us, respondent in the case below, and this court in the instant original action for writ of mandamus, are concerned solely with the foregoing italicized portion of Rule 21(b).

The plain and simple language of that part of Rule 21(b) under consideration is that the transfer sought should have been ordered only if respondent was satisfied that it was "in the interest of justice" to do so. This implies an element of discretion in the trial court.

The majority properly recognizes this discretion in the trial court and states that we would not be justi-

fied in overruling a denial of transfer unless "there is an abuse of discretion." In view of the extraordinary writ prayed for in the present original action before us, it would be fair to say that such writ should not issue unless we find respondent has erred to the point of a gross or clear abuse of discretion in denying the transfer.

It should be noted that respondent filed a written memorandum setting out in detail his consideration of the motion to transfer. This followed the submission of affidavits, briefs and oral argument by the parties.

In this memorandum respondent listed ten factors he found to be pertinent in the determination of the Rule 21(b) motion. These factors were (1) location of corporate defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket condition of each district or division involved; and (10) any other special elements which might affect the transfer.

Respondent then discussed each of these factors in detail in his memorandum. While Rule 21(b) does not set out governing standards, it is undisputed that these are relevant factors properly to be considered by a trial judge in determining a ruling on a transfer motion in a criminal case.

The only mention of respondent's concern about the difficulty of getting a fair and impartial jury in the District of Minnesota was at the conclusion of the memorandum. This is fully set out early in the majority opinion and reference is now made thereto.

My first cause for dissent is that the majority opinion gives no consideration to respondent's treat-

ment of the first nine factors above listed and discussed in detail in his memorandum. Footnote (1) of the majority opinion makes passing reference to such discussion and then concludes that "we are convinced that he saved the most important item for the last. * * * Certainly he was not expressing a minor afterthought."

In the next to last paragraph of the majority opinion appears the only other reference to other factors considered by respondent. In footnote (3), the majority gratuitously makes findings of its own, most of which are contrary to those in respondent's memorandum. The final paragraph in footnote (3) makes a finding with reference to the condition of the dockets in the two districts concerned which I cannot accept. I do not believe the record will support the inference intended to be drawn therefrom.

On balance, I conclude that a consideration of all the factors relied upon by respondent fails to demonstrate any abuse of discretion and certainly none sufficient to justify the issuance of this extraordinary writ.

Relying upon the authority of *Chicago, R. I. & P. R. Co.* v. *Igoe,* 7 Cir., 212 F. 2d 378 (1954), the majority holds that "it is nevertheless true that we may set aside its action if there is an abuse of discretion *such as its reliance upon an improper factor* in determining how the 'interest of justice' would be affected by the proposed transfer." (Emphasis added.)

The "improper factor" found by the majority was the reference made by respondent to petitioner's position of influence in the District of Minnesota and his statement that "[i]t would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois."

The majority first finds that respondent's action could lead to an abuse "in the selection of what may

be deemed a tribunal favorable to the prosecution," citing *United States* v. *Johnson*, 323 U.S. 273, 275 (1944); *Travis* v. *United States*, 364 U.S. 631 (1961); and *United States* v. *Cores*, 356 U.S. 405 (1958). Each of these three decisons are readily distinguishable from the case at bar. They are concerned solely with the determination of the venue of a criminal action and not with what factors are to be considered in determining the "interest of justice." There is no question of venue before us in this proceeding.

The majority concludes that respondent denied petitioner a trial in the District of Minnesota because it "has been an exemplary citizen of that district" and holds this was error, citing the Magna Charta. It is sufficient to say that respondent made no such holding.

The majority follows this with a holding that "it would be an unsound and dangerous innovation in our federal court system for a judge in any district to appraise or even speculate as to the efficacy of the operations of a federal court of concurrent jurisdiction in another district." *I agree.* But, in my judgment, respondent here was not guilty of such an encroachment. I cannot read into respondent's memorandum anything that would justify such a finding and holding by our court.

In the concluding part 4 of the majority opinon, it is expressly held that "this criminal case is impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district * * * [and] we are convinced that this multiple-venue criminal prosecution should be tried in the district of Minnesota, *which is the home of petitioner.*" (Emphasis added.)

If this holding stands and is followed, then in every multiple-venue criminal prosecution under the Sherman Act and kindred statutes, it will mandate

transfer to the home district of the defendant, if venue be found there, pursuant to a Rule 21(b) motion.

No authority has been cited as precedent for this holding and we have found none. There is nothing in Rule 21(b) to that effect.

The majority would impress its constitutional concern for trial in a defendant's home district upon Rule 21(b). Laudable as this purpose may be, it is my considered judgment that such an amendment should be left to the legislative branch of the government rather than to engraft it upon the rule through the judicial process.

Finally, I believe the majority has made an unprecedented procedural error in its disposition of this original action. It orders that a writ of mandamus shall issue forthwith directing respondent to vacate his order denying petitioner's motion for transfer and ordering him to transfer the criminal action to the District of Minnesota.

Assuming, *arguendo*, that under the authority of the *Igoe* case respondent relied upon an improper factor in determining the transfer motion, we should direct respondent to vacate the order of denial and reconsider petitioner's motion in the light of the majority holding.

It is suggested that at this stage of the proceeding we have no authority to mandate the transfer sought. In *Igoe*, 212 F. 2d at 382, this court ordered the cause remanded "to the District Court with directions to vacate the order denying the transfer and to reconsider petitioner's motion in the light of the views expressed herein." The court went on to hold:

> "Ultimate decision on that motion is within the province of the District Court, and we cannot, as petitioner would have us do, usurp its function and decide the question in this court."

In *Igoe*, it was not until the remand had been complied with that this court, sitting *en banc*, in a second original action issued a writ commanding the transfer requested, with one judge dissenting. *Chicago, Rock Island and Pacific Railroad Co.* v. *Igoe*, 7 Cir., 220 F. 2d 299 (1955), cert. denied, 350 U.S. 822.

It is my view, therefore, that in the present posture of this case we are without authority to direct the transfer.

This situation should remind us that we are encouraging parties to make use of this extraordinary procedure to effect an interlocutory review of a discretionary order. The experience of our court in recent years affords a firm conviction that "repetitive invocations of mandamus" are improperly becoming a way of appellant life.

I am in accord with the views of my Brother Castle, so well expressed in his recent dissent in *Chesapeake & Ohio Railway Company* v. *Parsons*, 7 Cir., 307 F. 2d 924, 926–28 (1962), cert. granted, — U.S. —.

I would deny the writ of mandamus sought in this proceeding.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS,
Petitioner,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF MINNESOTA MINING AND MANUFACTURING COMPANY IN OPPOSITION

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In the
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OCTOBER TERM, 1962

No. 1064

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v.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF MINNESOTA MINING AND MANUFACTURING COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 314 F.2d 369 and reprinted as an appendix to the petition at pages 19-38. Petitioner's Memorandum and Order in the district court denying respondent's motion to transfer, entered August 31, 1962, is reported unofficially in 1962

Trade Cas. ¶ 70,455 (E.D. Ill. 1962) and is reprinted herein as an appendix (pp. 25-35, *infra*).[1]

QUESTION PRESENTED

1. The only question presented is whether the court of appeals abused the discretion granted it under the All Writs Act when it ordered petitioner to allow defendant's transfer motion on this record where (a) petitioner's denial of the motion was based on a concededly improper consideration constituting an abuse of the discretion vested in him under Rule 21(b), (b) the uncontested record facts demonstrate that allowance of defendant's motion to transfer is in the interest of justice, and (c) petitioner had fully considered the relevant and uncontested record facts and had found in them no basis for denial of the motion to transfer.

2. Petitioner suggests that a second issue is "whether district judges, in determining whether a transfer would be in the 'interest of justice' under Rule 21(b), are required to give heavy or dispositive weight to evidence that the proposed transferee district is the headquarters, or

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[1] Throughout this brief, Chief Judge Platt is referred to as "petitioner" and Minnesota Mining and Manufacturing Company as "defendant." The district court opinion reprinted as the appendix hereto is cited "DCO .....;" the petition for a writ of certiorari and the court of appeals' opinion reprinted as the appendix thereto is cited "Pet. .....;" defendant's appendix in the court of appeals is cited "Pet. App. .....;" Judge Platt's appendix in the court of appeals is cited "R. App. ....." and his answer to the rule to show cause is cited "R. Ans. ....."

'home district', of a corporate defendant" (Pet. 3). While defendant urges that that fact is entitled to great weight, the record here fully supports the conclusions reached by the court of appeals, and the propriety of its writ, irrespective of the fact that the proposed transferee district is defendant's home district. Accordingly, the record here does not present the second question raised by petitioner.

RULES AND STATUTES INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a), provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Rule 21(b) of the Federal Rules of Criminal Procedure provides:

> "The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

STATEMENT

Petitioner seeks a writ of certiorari to review the decision of the Court of Appeals of the Seventh Circuit which awarded defendant a writ of mandamus ordering petitioner "to vacate his order denying [defendant's] motion for

transfer, and ordering him to transfer [this criminal action] . . . to the district of Minnesota." (Pet. 31). The decision of the court of appeals notes that petitioner denied the motion to transfer because he "believed that there was a likelihood of the Government not receiving a fair jury trial in Minnesota" (Pet. 21, 26) and held that "no order in any way based upon such reasoning can stand . . ." (Pet. 30). The petition does not contest the correctness of the appellate court's determination that consideration of the "fair trial" argument by the petitioner was error nor does it contest the availability of mandamus to correct this conceded abuse of discretion. It is urged only that the writ should have directed petitioner to reconsider the issue in the light of a proper standard instead of directing him to transfer the action forthwith (Pet. 12, n. 2).

This is a criminal action brought in Danville in the Eastern District of Illinois for alleged violations of the Sherman Act dating, according to the indictment, as far back as 1931 (Pet. App. 104). The record facts held by the court of appeals and here conceded by petitioner to be relevant to defendant's motion under Rule 21(b) to transfer this criminal action to its home district of Minnesota were considered both in petitioner's memorandum opinion in the district court denying the motion and in the opinion of the court of appeals. The opinion of the court of appeals contains the following summary of the record (Pet. 31, n. 3):

> "A trial in the Eastern District of Illinois will result in unjustifiable increased expenses to [defendant] of at least $100,000, great inconvenience of witnesses,

serious disruption of business and interference of contact between the [defendant's] executives and its trial attorneys in connection with protracted antitrust prosecution trial.

"[Defendant] has no office, plant or other facility in the Eastern District of Illinois.

"There is no serious congestion in the docket of the District Court of Minnesota, while a division of the cases pending in the Eastern District of Illinois between the two judges of that district would reveal a considerable case load for both of them."

The appellate court held that the record facts so summarized comprise a "demonstration by proof or admission of the essential elements of convenience, expense and early trial, constituting 'interest of justice' in a civil case . . ." (Pet. 30-31). Here, the court added, the weight to be accorded that demonstration was augmented by the additional consideration that the motion was to transfer a *criminal* action to the defendant's home district (Pet. 31). The court concluded that such a record compelled the grant of the motion to transfer under Rule 21(b) (Pet. 31).

The legal conclusion so reached by the court of appeals is consistent with petitioner's memorandum opinion and is based squarely on the record, on facts established by affidavits and uncontroverted by the Government. From petitioner's opinion it is clear that respondent has no physical facility—plant, office, or laboratory—within the Eastern District of Illinois (DCO 27; Pet. App. 16, 21); that none of those named as co-conspirators in the indict-

ment are located in the Eastern District of Illinois (DCO 27); that (contrary to the assertion made on petitioner's behalf here) no known prospective witness, for defendant or for the Government, lives in the Eastern District of Illinois (DCO 28-29; Pet. App. 53-54, 67; R. App. 74); that the offices of the attorneys for both parties (except for defendant's local attorney in Danville) are outside the Eastern District of Illinois (DCO 31); that no documentary evidence relevant to this cause originated within the Eastern District of Illinois and that "it would be an inconvenience for the defendant to locate and transport the necessary documents . . . to Danville . . ." (DCO 30; Pet. App. 18; 47-49); that, as petitioner found, "there can be little doubt that if the trial occurred in St. Paul there would be less disruption of defendant's business" (DCO 30) and, furthermore, that trial in Danville "would be more expensive to defendant" (DCO 30).

The uncontradicted record shows that the District of Minnesota is, as petitioner found, "the home district of the defendant" (DCO 27, 30); its general and administrative offices, main research laboratories, and several manufacturing plants are located there (DCO 27). All of the defendant's officers and employees most familiar with the matters put in issue by the indictment, whose presence will be required in preparation for and during the trial, live and work in the Twin City area (Pet. App. 18-20); defendant's legal department and patent lawyers are located in St. Paul (DCO 31); the personal contact between lawyer and client necessary before and during trial of complex antitrust and patent issues would be possible only

in the District of Minnesota (DCO 30). Patent license negotiations relevant to the charges of the indictment took place in the Minnesota district (Pet. App. 23, 26, 30, 34-35, 39-40).

At least twelve defense witnesses (Pet. App. 20-21, 27, 31-32, 36, 41, 57) and eleven witnesses called before the grand jury in Danville are located in the Minnesota district (Pet. App. 54, 57); other known witnesses on both sides located throughout the country will find the Minneapolis-St. Paul area vastly more accessible than Danville (Pet. App. 54-57): St. Paul is served daily by 100 airplanes, of which 36 are from Chicago, and eight trains from Chicago, as compared to eight planes (three from Chicago) and five trains (three from Chicago) to Danville (DCO 31-32; Pet. App. 55-56, 60-63).[2] Defendant's gen-

[2] Throughout the proceedings in the district court, attorneys for the Government refused (and petitioner sustained the refusal) to reveal even the location of the witnesses they expected to call (Pet. App. 132-133, 141). Government attorneys were careful to avoid any specific claim that any witness whom the Government intended to call could be found in the Eastern District of Illinois (Pet. App. 67; R. App. 74). The government suggested only that that if the court were to consider areas of 300-mile radii around the two proposed forums, more of its witnesses would be found in the arbitrary area proposed for Danville than for St. Paul. (Pet. App. 67). But the suggested Danville area includes Chicago, where several witnesses on both sides can certainly be found; there can scarcely be any dispute, however, that it is easier to get to St. Paul than to Danville from Chicago, even though the distance in miles is somewhat greater (Pet. App. 55-56). Defendant's showing on witnesses was not limited to its own witnesses (Pet. App. 53-54); its affidavits demonstrate not only that St. Paul is overwhelmingly more convenient for its witnesses but also for the 42 witnesses known to the defendant to have testified before the Danville grand jury (Pet. App. 53-54).

eral corporate files (4000 file drawers concern products involved in the indictment), its operating division files (over 300 drawers), its patent attorneys' files (15 cabinets), and its copies of 15,000 documents furnished to the Government and Grand Jury are located in St. Paul (DCO 30; Pet. App. 18, 47-48). The record also details the great and serious disruption of defendant's business operations that a Danville trial would cause (Pet. App. 18-20, 30-31, 35-36, 40-41, 47-49), a disruption which would be greatly reduced and minimized were the trial held in St. Paul (DCO 30). The record establishes, moreover, that the cost of trial to defendant would be less in St. Paul (DCO 30), as compared to Danville, by at least $100,000 (Pet. App. 22, 52).

These record facts, while not stressed in petitioner's memorandum opinion, were neither refuted nor left unconsidered by him. It is clear from his opinion that petitioner thought the trial should be held in Danville because the Government could not obtain a fair trial in Minnesota (DCO 34-35). His discussion of other record facts demonstrates that he considered them only to justify retention of the case in Danville (DCO 27-33). Indeed, his consideration of these facts dwells on their adequacy to demonstrate that a defense *could* be managed in Danville, not whether the trial *should* be held there.

Petitioner's affirmative conclusion on the feasibility of a Danville defense appears from his opinion to have been based on evidence that defendant had once appeared as an involuntary party plaintiff in an infringement suit brought in East St. Louis, within the Eastern District of Illinois (DCO 29; Pet. App. 43-44, 66, 133); that defendant could

prepare for trial by long-distance telephone (DCO 30); and that Danville itself is served, albeit with relative infrequency, by commercial planes and trains from Chicago, could be reached by defendant's private planes, and, moreover, can be reached from the Minneapolis-St. Paul area by automobile after a drive of only twelve successive hours (DCO 31-33).

The memorandum also records such facts as the record affords tying the case to Danville: that the Government has already delivered documents, in nine neatly packed file boxes, to Danville (DCO 29) and that the Government asserts that the total amount it would have to pay in witness fees would be less by an undetermined amount for a trial held in Danville rather than in Minnesota (DCO 31), even though no known Government witness actually is to be found in the Danville district (Pet. App. 54, 67; R. App. 74). Petitioner's only statement favoring Danville, that "without a doubt" a trial could be had sooner in Danville than in St. Paul (DCO 33), is based on an apparent intention to arrange an early trial rather than on the record showing that the dockets in both of the districts in question are current, the average case load per judge being 163.5 in the Eastern District of Illinois and 141.5 in the Minnesota district (Pet. App. 24, 58, 94-95).

In his answer to the court of appeals' order to show cause, petitioner departed from the text of his memorandum opinion to assert that the fair trial consideration was but one of several bases for his denial of the transfer motion (R. Ans. 3-5); this restatement is set forth in full at pages 9-10 of the petition. The other considerations to which he pointed are, however, either mere assertions

that the district court has venue (DCO 29), which is not the issue under the transfer motion, or are wholly unsubstantiated by the record. There is nothing in the record to show, as was there averred (R. Ans. 4), that transfer would delay trial a year or, for that matter, that a period of a year for preparation would be unreasonable in view of the complexities of the charges of the indictment.[3] The statement that "a speedy trial was necessary because some of petitioner's competitors are in financial straits owing to petitioner's alleged conduct and to the fact that petitioner has refused to halt its allegedly illegal activities," surprising in the light of the presumption of innocence accorded to defendants in criminal cases, is based on the avowal of the prosecuting attorneys rather than on any factual showing (R. Ans. 4). General "avowals" are also, as already noted, the only support for petitioner's suggestion that the Government's witnesses would be inconvenienced and its overall payment in witness fees increased if the trial were held in Minnesota (DCO 31; Pet. 7; R. Ans. 4).

Petitioner's further observation—that respondent "has operated on a nation-wide scale . . . in the industries here involved; that there is support for the Government's avowal that petitioner's overt acts have substantially affected the residents of the Eastern District of Illinois; that this is not an 'imported case' . . ." (R. Ans. 4)—relates

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[3] It should be noted that the indictment covers a 30 year period and that since 1945 (not 1958, as stated in the petition, Pet. 3) the prosecution has been gathering information and documents from defendant's files (Pet. App. 16-17; R. App. 32-33).

obviously only to the question of venue. In fact, on the record made on the transfer motion, even venue in the Eastern District of Illinois is questionable as is shown in petitioner's memorandum opinion in which he brushed the problem aside with the statement that "the defendant will not suffer if the Government should fail to prove venue, because the indictment or counts in the indictment so affected would have to be dismissed" (DCO 29).[4]

REASONS FOR OPPOSING THE WRIT

I. The Form of the Writ of Mandamus is Proper.

The decision of the court of appeals rests, as the preceding statement of facts shows (*supra*, pp. 3-11), on the peculiar facts of this record. This is a *criminal* action against a single defendant arbitrarily brought in a district which has little if any connection with matters alleged in the indictment. The petition states unequivocal-

[4] Venue in both proposed forums was stipulated, but only for purposes of the arguments on the transfer motion (Pet. App. 149). The Government's showing on the transfer motion certainly does little to show venue in the Eastern District of Illinois. On one product line involved in the indictment there is no record evidence indicating the existence of venue there; on the other two product lines the prosecution has pointed to two letters (dated 1953 and 1958) that refer to customers located in the Eastern District of Illinois (R. App. 50) and defendant's appearance as an involuntary party plaintiff in the Eastern District of Illinois (Pet. App. 43-44, 66, 133). While the prosecution claims that the subject matter of that suit is involved here (Pet. App. 132-133), it is only one of 34 patent infringement suits about which it makes the same claim (Pet. App. 69-75).

ly that "the correctness of the Seventh Circuit's holding that it was impermissible to take into account the difficulty of assembling an unbiased jury . . ." in the transferee district is uncontested (Pet. 12). The petition argues (Pet. 13-15) only that the writ should have ordered a remand, a position that concedes that the issuance of a writ of mandamus was proper in the circumstances presented by this record. The petition to this Court reduces to a claim that the court of appeals abused its discretion when it worded the writ to direct immediate transfer instead of allowing petitioner a second opportunity to review the record and decide the motion (Pet. 15).

A. The Appellate Court's Direction to Transfer Was Compelled by the Record Facts.

The court of appeals, in ordering transfer of this criminal case, acted under "the supplementary review power conferred on the courts by Congress in the All Writs Act" which this Court has held is meant to "be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' . . ." *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953). Obedient to the mandate of this Court, the Seventh Circuit has consistently refused to exercise powers of mandamus when lower court dispositions of transfer motions were based on errors insufficient to constitute abuses of discretion. *E.g.*, *A. C. Nielsen Co.* v. *Hoffman*, 270 F. 2d 693 (7th Cir., 1959); *Sypert* v. *Miner*, 266 F. 2d 196 (7th Cir.), *cert. denied* 361 U.S. 832 (1959). In this case consideration of the "fair trial" issue was clear and obvious error which, as the appellate court recognized (Pet. 30) and the peti-

tion here concedes (Pet. 12), constituted an abuse of discretion correctable by mandamus.[5]

Petitioner found the difficulty of getting a fair and impartial jury in Minnesota "*material* in determining where the cause should be tried" (DCO 35, emphasis supplied). But his discussion ranged throughout the record and, although he made no finding on the basis of relevant facts which indicated that the transfer should be denied, it was argued to the court of appeals that his decision was based on several factors (R. Ans. 3). The court of appeals was therefore *compelled* to look at the record underlying the lower court's memorandum to ascertain whether petitioner's decision had any other basis. Its review revealed a "demonstration by proof or admission of the essential elements of convenience, expense and early trial, constituting 'interest of justice' in a civil case . . ." in the context of a *criminal* case in which the transfer asked for was to the home district of the defendant (Pet. 30-31).

We have shown (pp. 4-11, *supra*) that the appellate court's appraisal of the record facts is not inconsistent with petitioner's findings. But even if the appellate court had reached its conclusion, as the petition implies (Pet. 2, 14), on the basis of *de novo* findings, the decision would have been perfectly proper. The record here is documentary; the district court would have no special advantage in

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[5] The Seventh Circuit had previously held that consideration of improper factors of the "interest of justice" was an abuse of discretion. *Dairy Industries Supply Ass'n* v. *LaBuy*, 207 F. 2d 554, 558 (7th Cir. 1953).

evaluating it, even if the facts were conflicting. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-396 (1948). But the facts of this record are completely one-sided: there are virtually no relevant record facts weighing against transfer;[6] the record weighs so overwhelmingly on the side of transfer that the interest of justice, the essential and sole criterion of Criminal Rule 21(b), required transfer as a matter of law.

Petitioner's refusal to transfer on this record, if allowed to stand, would amount to judicial repeal of Rule 21(b). In the last analysis there is nothing to support trial in the transferor forum beyond the fact that it is the forum the prosecution chose. But a principal purpose of Rule 21(b) was the elimination of gross injustices formerly produced by allowing the prosecution an absolute right to choose the forum in multi-venue conspiracy cases, particularly anti-trust cases. The resulting abuses were described by Judge Medalie, a member of the Advisory Committee which drafted the revision of the Criminal Rules, as " . . . pretty shabby business for the great government of the United States to indulge in. . . . If, for example, a business' headquarters are in Chicago, everybody is there, every

[6] The trial court observed that "without a doubt" the case could be tried sooner in Danville than Minnesota (DCO 33). While the state of the dockets may be of importance in a case where one is congested and the other not, we submit that it should not be determinative, or even important, in a situation where the dockets in both courts are current (Pet. App. 24; see p. 9, *supra*), especially in the face of a record showing that all other relevant factors strongly favor one forum over the other. And, certainly, the comparative status of dockets in the two forums is a question that can be determined as well by the appellate as by the district court.

book and record is there, practically every witness is there on both sides, then try it in Chicago. That is the decent thing to do and accords better with the dignity of our great government. . . ." *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 395-398 (S.D. Cal. 1947); see also, *United States* v. *E. I. duPont deNemours & Co.*, 83 F. Supp. 233, 234 (D.D.C. 1949); *Krulewitch* v. *United States*, 336 U.S. 440, 452-453 (1949) (concurring opinion).

In the light of the purpose of Rule 21(b) and the nature of the record before it, it is hardly surprising that the court of appeals determined as a matter of law that this case should be transferred.[7] Any other decision would have wrought injustice in this case and, if followed, would have nullified Rule 21(b)'s usefulness as the "valuable tool of justice" which this Court has recognized it to be. *United States* v. *Cores*, 356 U.S. 405, 410 (1958).

No record justification can be found for sending this case back to petitioner for further consideration. What could petitioner reconsider on remand? The "fair trial" issue removed, can it be seriously suggested that moving nine ordinary-sized file boxes to St. Paul outweighs the extreme inconvenience, expense, and handicap in its trial preparation that denial of transfer would create for defendant: the transportation of documents, witnesses, and attorneys to Danville; the substitution of the long-distance telephone for personal contact between attorneys and client in the preparation for and conduct of trial; the disruption of its

[7] "The effect of admitted facts is a question of law." *Nelson* v. *Montgomery Ward Co.*, 312 U.S. 373, 376 (1941); see also, *Exmoor Country Club* v. *United States*, 119 F. 2d 961, 963 (7th Cir. 1941). The language of Rule 21(b) is mandatory that the case *"shall"* be transferred if transfer is "in the interest of justice."

normal business operations while executives having knowledge of matters in issue move to Danville for the duration of a lengthy trial?[8] Or that defendant's demonstration that a St. Paul trial will result in a cost saving of a minimum of $100,000 may, after due deliberation, be outweighed by the purely assertive and speculative saving that might accrue to the Government if it were allowed to transport witnesses from undisclosed locations to Danville rather than to St. Paul?

Indeed, only by adopting the philosophy urged to both courts below and given credence in petitioner's opinion (DCO 30, 33), that defendant because of its size and the magnitude of its financial transactions is not entitled to the benefit of considerations ordinarily determinative of the interest of justice, could a decision contrary to that of the court of appeals be reached on this record. We are confident that the Court will reject the suggestion that Rule 21(b) incorporates a dual standard which would make it unavailable to defendant. As Judge Yankwich pointed out, the rule embodies the same standard of justice "whether the defendant be poor or rich, a small or a large corporation. Neither the rules nor our system would justify the elimination of any of these elements merely because

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[8] See *United States* v. *General Motors Corp.*, 194 F. Supp. 754, 756 (S.D. N.Y. 1961) and *United States* v. *American Natural Gas Co.*, 1959 Trade Cas. ¶69,265 at p. 75,034 (E.D. Wis. 1959). As Judge Tehan pointed out in the *American Natural Gas* case: "No one who has had experience in protracted litigation involving important stakes such as are involved here can be at all realistic and not recognize the need and value of close contact between clients, officers of corporations, and records, and attorneys immediately prior to and during the course of the trial."

the defendants . . . may be persons of great wealth or corporations with large resources." *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 397 (S.D. Cal. 1947).

B. The Form of the Writ of Mandamus is a Matter Properly Within the Discretion of the Appellate Court, and the Appellate Court Did Not Abuse Its Discretion By Directing Transfer of This Case.

This case is one affecting the continued vitality of Criminal Rule 21(b) as a "valuable tool of justice." *United States* v. *Cores*, 356 U.S. 405, 410 (1958). The Court has made it clear that in such exceptional cases, especially when misapplication of rules promulgated by this Court is involved (*McCullough* v. *Cosgrave*, 309 U.S. 634 (1940); *Los Angeles Brush Co.* v. *James*, 272 U.S. 701, 706 (1927)), the appellate courts can and should exercise a proper and necessary "supervisory control" over the district courts. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260 (1957). Because injustices effected through erroneous application of Rule 21(b) cannot be adequately remedied after trial, they present situations particularly appropriate for the exercise of mandamus.

The claim here that "once the error [in the initial decision] was laid bare" the court of appeals should have remanded to petitioner for further consideration (Pet. 12) finds no support in the record here or in the law. There is no "established judicial procedure" supporting this position (Pet. 12). Indeed, the question posed here by petitioner was considered only recently by the Court of Appeals for the Second Circuit in *Lummus Co.* v. *Commonwealth Oil Ref. Co.*, 297 F. 2d 80, 90 (2d Cir. 1961), *cert. denied* 368 U.S. 986 (1962). Under the facts of that case the

court concluded that it was necessary to direct, through writ of mandamus, that an order of a district court be vacated insofar as it was based on an improper consideration. The court found that it then had to consider the form that the writ should take: "we must now decide whether we should so limit our decision [to the improper consideration by the district court] *or should also pass upon the other issues* . . . to the full extent the record will permit, although we might not have considered mandamus if they had stood alone." 297 F.2d at 90 (emphasis supplied). The court concluded that it could "lawfully pursue either course" but that it was preferable for it to review the entire record in order to prevent further delay, and because "we see no purpose in a . . . [remand], when all material needed for . . . disposition is before us, and, in our view, any determination in [respondent's] favor by the District Court would ultimately have to be reversed as erroneous in law." 297 F. 2d at 90.

The only authority the petition cites on this point is an opinion written by the court whose decision here is under attack. In that case, *Chicago R. I. & Pac. R.R.* v. *Igoe*, 212 F.2d 378, 382 (7th Cir. 1954), the Seventh Circuit, by writ of mandamus, directed a district judge to reconsider his denial of a transfer motion in a civil action. The denial had been based on an improper consideration and there had been no consideration of relevant record facts, so that the abuse of discretion was clear without further examination of the record. On remand the district judge again denied the motion, this time on the basis of the record as a whole. Another application for mandamus was made, and

the court of appeals examined the record. It found that the case was brought in a district which had "no relation to the litigation . . .", whereas "the balance of convenience of the parties" was "so overwhelmingly in favor of the defendant that . . . the denial . . . of the motion to transfer . . . was so clearly erroneous that it amounted to an abuse of discretion." *Chicago, R. I. & Pac. R. R.* v. *Igoe,* 220 F. 2d 299, 304, 305 (7th Cir.), *cert. denied* 350 U.S. 822 (1955). Accordingly, the court by mandamus directed the district judge to transfer the action. With respect to the statement in its earlier decision quoted by petitioner here (Pet. 14), the court said, "all we intended to say was that the District Court must, *initially,* make the decision *by applying the statutory tests* . . ." 220 F.2d at 302 (emphasis supplied). "We thought we clearly delineated the scope of our [earlier] decision," the court added, "when we stated: 'however, this opinion deals with the existence of power [to issue the writ] only, not with the permissible limitations on its exercise.' " 220 F. 2d at 302.

The record in the present case, in which all of the record facts were initially considered by petitioner, parallels the record of the second *Igoe* case, and of the *Lummus* case, and as the appellate court recognized, requires identical disposition. There was no error, still less abuse, in the appellate court's exercise of its discretion under the All Writs Act and the petition for certiorari should accordingly be denied.

II. The Appellate Court's Decision Can Not Have the Effect of Requiring That All Defendants in Multi-Venue Criminal Cases Be Tried in Their Home Districts.

The decision of the court of appeals could not have the effect, prognosticated by the dissenting judge (Pet. 36-37) and, with less conviction, concurred in by the petition (Pet. 16), of determining that every defendant in a criminal case is entitled to be tried in the vicinage of its home office. While great weight should be given to the fact that transfer was sought to its home district, that fact was only one reason—a cumulative one—for transfer. This action was arbitrarily brought in a district with which it has no real connection. Defendant supported its motion to transfer with an overwhelming factual showing, in terms of convenience to the parties and witnesses and substantial lessening of trial expense, favoring transfer to Minnesota. Transfer should have been allowed under these circumstances whether or not the transferee district was the home district of the defendant.

Far from confusing "two quite different doctrines," as the petition suggests (Pet. 16), the court of appeals' transfer of this case to the vicinage of defendant's home office carried out the essential purposes of Rule 21(b) and reached, in the words of this Court in *United States* v. *Cores*, 356 U.S. 405, 410 (1958), a "result . . . entirely in keeping with the policy of relieving the accused, where

possible, of the inconvenience incident to prosecution in a district far removed from his residence.'"

Defendant makes no claim that this established policy favoring trial in the defendant's home district is absolute. It does not operate unless venue lies in the defendant's home district, and even so, the facts may on balance show that it is not in the interest of justice to have the trial there. There is no possibility that the decision that petitioner asks the Court to review could change that settled law or in any way increase the weight to be given to the home district factor in future transfer cases. The opinion of the court of appeals holds simply that when there is no reason other than a minimal showing of venue for having the trial in the district in which it was brought and

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[9] This policy has, as the court of appeals recognized, ancient origins in the common law. Particularly is it foundational to American legal traditions. The Declaration of Independence cited among the wrongs wrought by George III those "depriving us . . . of the benefits of Trial by Jury [and] . . . transporting us beyond the Seas to be tried . . . " and the reference was to the proposal by Parliament that Americans be tried abroad or in other American colonies for crimes committed in their own colonies, about which "the Virginia Resolves of May 16, 1769, voiced the unanimous view that 'thereby the inestimable Privilege of being tried by a Jury from the vicinage, as well as the Liberty of summoning and producing Witnesses on such Trial, will be taken away . . .'" *Johnston* v. *United States*, 351 U.S. 215, 224 (1956) (Mr. Justice Douglas dissenting); see also, 2 Story, Constitution, Sec. 1781 (5th ed.). In *United States* v. *Johnson*, 323 U.S. 273, 276, 278 (1944), this Court pointed out that "the underlying spirit of the constitutional concern for trial in the vicinage" required the avoidance of statutory constructions allowing venue "in places remote from home." See also, *Hyde* v. *Shine*, 199 U.S. 62, 78 (1905).

there are overwhelming reasons of convenience and cost saving for holding the trial in the home district of the defendant, the case should be transferred.[10] This is hardly a startling legal proposition or one that could prove "unsettling and disruptive in multi-venue criminal cases," as the petition avers (Pet. 17). It is rather a minimal statement of what is required by "the interest of justice" under Rule 21(b).

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[10] The result reached by the court of appeals is entirely consistent with the judicial application of Rule 21(b) in earlier cases involving transfer to a defendant's home district. *E.g.*, *United States* v. *General Motors Corp.*, 194 F. Supp. 754, 756 (S.D. N.Y. 1961); *United States* v. *Cashin*, 281 F. 2d 669, 675 (2d Cir. 1960); *United States* v. *Olen*, 183 F. Supp. 212, 217 (S.D. N.Y. 1960).

CONCLUSION.

Because the decision of the court of appeals below is correct, is consistent with the decisions of this and other federal courts, and does not present an important federal question, defendant respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
Plaintiff,
v.
MINNESOTA MINING AND MANUFACTURING COMPANY,
Defendant.

CRIMINAL ACTION
No. 61-73-D

MEMORANDUM AND ORDER

The defendant presents a motion in accordance with Rule 21(b), Fed. Rules Crim. Proc., 18 U.S.C.A., for the transfer of this case to the United States District Court for the District of Minnesota. Defendant's counsel, in their brief and argument, stress transfer to St. Paul, Third Division. (28 U.S.C.A. §103(3)). The defendant has filed affidavits in support of its motion and the Government has filed affidavits in opposition thereto. Both the Government's counsel and defendant's counsel have filed briefs and argued their position orally, ably, and at great length.

The Government has stipulated that the offense charged in the indictment "was committed" in the Eastern District of Illinois, the District of Minnesota, and the Northern District of Illinois. Therefore, Rule 21(b) is appropriate as a basis for the motion in this case.

Under Rule 21(b) it is necessary in the determination of the motion to transfer that the Court determine from the facts and circumstances whether it is satisfied "that in the interest of justice the proceedings should be transferred." Once a court is satisfied that it would be "in the interest of justice" to transfer under Rule 21(b) it becomes obligatory upon the court to enter an order of transfer.

The term "in the interest of justice" is broad in its meaning. It requires an examination of many factors as criteria in determining the defendant's motion. The defendant in its brief sets out these factors as follows:

1. Location of corporate defendant.
2. Location of possible witnesses.
3. Location of events likely to be in issue.
4. Location of documents and records likely to be involved.
5. Disruption of defendant's business unless the case is transferred.
6. Expense to the parties.
7. Location of counsel.
8. Relative accessibility of place of trial.
9. Docket condition of each district or division involved.
10. Any other special elements which might affect the transfer.

A review of these factors should determine whether the case should be transferred. See United States v. National City Lines, D.C.S.D.Cal., 1947, 7 F.R.D. 393. The Court will discuss each factor, taking into consideration the facts set out in the affidavits, briefs, and oral argument. Furthermore, the Court will at all times keep in mind that the defendant is to be considered innocent of the charge in the indictment.

The indictment in this case charges the defendant, in nine counts, with violations of §§1 and 2 of the Sherman Act, 15 U.S.C., by the unlawful manipulation or misuse of patents. The first three counts set the pattern for counts four, five, six, and seven, eight, and nine. The first three counts are concerned with pressure sensitive tapes. Count one charges the defendant and others with an attempt to

monopolize the flow of pressure sensitive tapes in the United States and in foreign countries. Count two charges the defendant with conspiracy in restraint of trade or commerce among the several states etc. 15 U.S.C. §1. Count three charges the defendant with conspiracy to monopolize trade or commerce among the several states etc. 15 U.S.C. §2. Counts four, five and six are similar, but the charges are in regard to magnetic recording media. Counts seven, eight, and nine refer to aluminum presensitized lithographic plates.

LOCATION OF DEFENDANT AND CO-CONSPIRATORS

The defendant is a corporation, organized under the laws of Delaware, and has its principal place of business in St. Paul, Minnesota. It has been located there since about 1911. Its main research laboratory and several manufacturing plants are all in and about St. Paul; thirty-three plants and twenty branch sales offices are located outside Minnesota.

The co-conspirators named in the indictment, with their location, are as follows:

Johnson & Johnson	New Brunswick, New Jersey
Permacel-LePage's, Inc.	New Brunswick, New Jersey
Permacel Tape Corporation	New Brunswick, New Jersey
Industrial Tape Corporation	New Brunswick, New Jersey
The Revolite Corporation	New Brunswick, New Jersey
The Kendall Company	Boston, Massachusetts
Norton Company	Worcester, Massachusetts
The Seamless Rubber Company	New Haven, Connecticutt
Johns-Manville Corporation	New York, N. Y.
A. B. Dick Company	Niles, Illinois
Armour Research Foundation of Illinois Institute of Technology	Chicago, Illinois

POSSIBLE WITNESSES

Defendant states "twenty-four former or present employees of alleged co-conspirators testified before the grand jury or were interrogated informally by government counsel in Chicago. Of these, at least eleven reside in New Jersey or New York within reasonable proximity to the New York metropolitan area, four are from Massachusetts, four are from the Chicago area, and two or three spend their time between Florida or Arizona and the Eastern seaboard." The location and number of other witnesses before the grand jury, excepting 3M personnel, are as follows:

"St. Paul, Minnesota	(1)
Chicago, Illinois area	(2)
New York City area	(8)
Boston, Massachusetts	(2)
Philadelphia, Pennsylvania	(1)
Reading, Pennsylvania	(1)
Kansas City, Missouri	(1)
San Francisco, California	(1)
Los Angeles, California	(1)
Miami, Florida	(1)"

The Government, through its attorney, Mr. Earl Jenkinson, states in his affidavit that "while [he] will not reveal their home locations, he will state that a substantial number of the government's witnesses live within a 300 mile radius of Danville, Illinois, whereas only one or two of its presently contemplated witnesses live within a 300 mile radius of St. Paul-Minneapolis, and they are minor witnesses. Danville is substantially closer and more con-

venient for the majority of the key government witnesses." Thus, it appears that those witnesses who are officers or employees of the defendant will find it more convenient if the case was transferred to Minneapolis-St. Paul, but as to other witnesses the question of convenience is not so easily determined.

LOCATION OF EVENTS LIKELY TO BE IN ISSUE

In the main the indictment charges the defendant with improper use of its patents in coercing competitors to accept patent license agreements on illegal terms by suing or threatening to sue for infringement. The Government states one of these patent infringement suits was tried in this District at East St. Louis, and that others occurred in various parts of the United States. The defendant insists that it was an involuntary party plaintiff in the East St. Louis action. The defendant states that more activities by the defendant in relation to patents occurred in the District of Minnesota, where its patent attorneys are located, than in the Eastern District of Illinois. It is difficult for this Court to determine without the disclosure of evidence by both Government and defendant where the greater number of these negotiations took place. The defendant contends that venue on all counts does not exist in the Eastern District of Illinois. The indictment alleges venue in the Eastern District of Illinois. The defendant would not suffer if the Government would fail to prove venue, because the indictment or counts in the indictment so affected would have to be dismissed.

DOCUMENTS

The Government now has nine large heavy corrugated boxes, 24 inches long, 15 inches wide, and 13 inches deep containing documents relative to this cause in the Clerk's

office in Danville, Illinois. Over 15,000 of these documents were obtained from the defendant. The other documents which the defendant might use at the trial are located in St. Paul. It would be an inconvenience for the defendant to locate and transport the necessary documents which it might use at the trial to Danville. On the other hand, the Government would be required to transport its documents to Minneapolis-St. Paul. No claim is made that the documents which the defendant might use will be indispensable to defendant's day to day operation of its business.

DISRUPTION OF BUSINESS OF DEFENDANT

There can be little doubt that if the trial occurred in St. Paul there would be less disruption of defendant's business. Consultation preparatory for trial between defendant's officers and employees and counsel could be conducted at St. Paul, wherever the trial occurred. Consultation during the trial could be conducted by telephone whether the cause was tried in St. Paul or Danville. Naturally, counsel could talk in person with defendant's officers and employees if the trial were held in St. Paul. The trial will take considerable time wherever the case is tried and it will require some of defendant's officers and employees to take time from defendant's business, but when consideration is given to the size of defendant's operation, the number of its plants, and their locations, the interruption of defendant's business should not be too great.

EXPENSES TO PARTIES

If the trial were held in the Eastern District of Illinois rather than in St. Paul, the home District of the defendant, it would be more expensive to the defendant. The defendant would be required to hire local counsel if the case were tried in Danville, but could use its local general counsel in

St. Paul. In St. Paul, defendant states, office space for defendant's attorneys could be easily supplied without cost, but not in Danville. The witness fees to be paid by the Government would be less in total amount if the case were tried in Danville, for the reason that Danville is more centrally located than St. Paul. The expense to the defendant for transporting its officers and employees as witnesses would be a lesser amount if the cause were tried in St. Paul. The Government contends that it will not be required to rent office space in Danville because the United States District Attorney for the Eastern District of Illinois has office space available. Possibly the United States District Attorney in St. Paul would make space available to counsel for the Government.

LOCATION OF COUNSEL

The Government attorneys are located in Chicago, and Mr. Chadwell and Mr. McGee, who have appeared for the defendant in this case, are also located in Chicago. The defendant's legal department and its retained patent lawyers are located in St. Paul. Danville can be easily reached from Chicago, Illinois, by automobile, air, or train.

ACCESSIBILITY OF PLACE OF TRIAL

Defendant maintains that St. Paul is more accessible for all the witnesses and attorneys. There are direct air flights from New York to Minneapolis-St. Paul, and this might accommodate the witnesses from Metropolitan New York. This distance to Minneapolis-St. Paul would be greater than if the witnesses traveled from the New York area to Chicago, and then to Danville. There are more rail and air connections between Chicago and St. Paul than between Danville and Chicago. Danville has an airport which will accommodate most all piston planes. It has

a schedule of flights from Chicago to Danville and return as follows:

Chicago to Danville 10:25 a.m. arrive 11:29 a.m.

Chicago to Danville 3:15 p.m. arrive 4:51 p.m.

Chicago to Danville 6:30 p.m. arrive 7:34 p.m.

Danville to Chicago 7:53 a.m. arrive 8:55 a.m.

Danville to Chicago 11:24 a.m. arrive 12:24 p.m.

Danville to Chicago 4:48 p.m. arrive 5:50 p.m.

The train service from Chicago to Danville and return is as follows:

Chicago & Eastern Illinois Railroad—

Lv. Chicago 3.45 p.m. arrive 5:54 p.m.

Lv. Chicago 8:00 p.m. arrive 10:20 p.m.

Lv. Chicago 10:45 p.m. arrive 12:56 a.m.

Lv. Danville 7:00 a.m. arrive 9:05 a.m.

Lv. Danville 5:00 p.m. arrive 7:50 p.m.

Air travel is on Daylight and Eastern Time and train travel is on Standard Time.

Danville is also 86 miles from Indianapolis, Indiana, and about 60 miles from Terre Haute. Plane, bus, or train connections could be made from Terre Haute to Danville, and plane and bus connections from Indianapolis.

The Wabash Railroad Company has two trains a day into Danville from St. Louis, Missouri, and two from Detroit, Michigan.

There are also excellent hardroads in all direction to Danville and especially from Chicago. With the excellent

roads between St. Paul and Danville, without entering the heavy traffic in Chicago, the trip can be made by automobile in about twelve hours. This Court has driven this route in twelve successive hours.

Witnesses are usually interviewed by counsel before they take the witness stand. Witnesses could easily arrive in Danville the night before they were to be used, thus, giving counsel an opportunity to interview the witness before the witness is used.

The defendant also operates its own planes. These could be used for transportation of counsel, officers, and employees of the defendant, as well as for the purpose of transporting necessary documents. It probably would not take more than three hours to fly from St. Paul to Danville, a distance of approximately 500 miles.

DOCKET CONDITION

The docket in Danville, without a doubt, would provide a trial at an earlier date than in the Minnesota District. At the present time there are but two criminal trials pending on the Danville docket, and these are set for trial September 19 and 20.

SPECIAL ELEMENTS OF HARDSHIP

From the affidavit of Mr. William L. McKnight, Chairman of the Board of defendant, it appears he is the gentleman who is mainly responsible for the phenomenal growth of 3M. No doubt he is a most capable and fine gentleman. His physical condition, unfortunately, may be somewhat taxed by his attendance at the trial whether the trial occurs in St. Paul or Danville. The newspaper clippings displaying photographs, exhibited to the Court by Government's counsel, show that Mr. McKnight was able to attend a dance and to look after his racing stable last Feb-

ruary. He had a serious operation in March, 1961 but apparently has recovered and is now in substantially good health. While this Court feels most kindly toward a man of Mr. McKnight's age, it is this Court's opinion that he could make himself most comfortable in one or the other of Danville's hotels, or at the new Holiday Inn Motel which will soon be ready for occupancy, and is only one block from the federal building.

There is one other item which cannot be overlooked in passing upon this motion. For more than 50 years 3M has had many employees and stockholders in the St. Paul area. 3M has grown from a small corporation to an industrial giant while located in the St. Paul area. Its officers and employees have been active in civic affairs. They hold official positions in over thirty-three financial, civic, and educational institutions. All of these activities are to the credit of 3M, but at the same time when one considers the number of contacts that its employees and stockholders have made over the area, and the pride that the community in that area would have, and should have, in 3M, there might exist a very severe influence on any citizen in the area called for jury service. It also must be noted that the charge in the indictment is a misdemeanor, and that the Government and the defendant each have but three peremptory challenges. Rule 24(b), Federal Rules of Criminal Procedure, 18 U.S.C.A. Counsel for the defendant, in his argument, has made the suggestion that the jury might be drawn from outside the counties of Ramsey and Hennepin where there isn't the concentration of officers, employees, and stockholders of 3M. The influence of 3M and its personnel would probably make itself felt among the citizens in the counties adjacent to Ramsey County where St. Paul is located and to Hennepin County where Minneapolis is located. These facts are

material in determining where the cause should be tried. See United States v. Hoffa, D.C.S.D. Fla., 1962, 205 F. Supp. 710, 722. It would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois.

This Court has carefully reviewed the facts and circumstances relating to the transfer of this case "in the interest of justice." Some facts mentioned by counsel have not been noted in order not to lengthen this memorandum. The Court has concluded that "in the interest of justice" the cause should be tried in the Eastern District of Illinois.

Therefore, the motion to transfer is denied.

IT IS SO ORDERED.

Entered this 31st day of August, 1962.

Casper Platt
United States District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 113

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS, PETITIONER

v.

MINNESOTA MINING AND MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinions of the court of appeals (R. 238–254) are reported at 314 F. 2d 369. The memorandum and order of the district court denying respondent's motion to transfer (R. 219–227) have not been reported.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1963 (R. 255). On March 28, 1963, Mr. Justice Clark extended the time within which to file a petition for a writ of certiorari to and including April 29, 1963 (R. 256). The petition was filed

on the latter date, and was granted on June 17, 1963 (R. 257; 374 U.S. 825). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

A motion under Rule 21(b) of the Federal Rules of Criminal Procedure to transfer a multi-venue Sherman Act case to the district of the corporate defendant's headquarters was denied by the district court on the ground that transfer was not in the "interest of justice." On mandamus, the court of appeals held that it was improper for the district court to consider, as one element in its determination, the difficulty of selecting an impartial jury in the district of the defendant's headquarters. The court of appeals then issued a writ of mandamus ordering transfer to that district. The questions presented are:

1. Whether the court of appeals, having concluded that one of several factors relied upon by the district judge was an improper consideration, should thereupon have remanded the case to the district judge with instructions to exercise his discretion in light of a proper standard, rather than ordering a transfer on the basis of the reviewing court's own *de novo* findings and evaluation of the facts.

2. Whether district judges, in determining whether a transfer would be in the "interest of justice" under Rule 21(b), are required to give heavy or dispositive weight to the fact that the proposed transferee district is the headquarters, or "home district," of a corporate defendant.

STATUTE AND RULE INVOLVED

Section 1651(a) of Title 28 U.S.C. provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 21(b) of the Federal Rules of Criminal Procedure provides:

> *Offense Committed in Two or More Districts or Divisions.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

STATEMENT

On December 13, 1961, a grand jury sitting in Danville, Illinois, in the United States District Court for the Eastern District of Illinois, returned a nine-count indictment charging the respondent, Minnesota Mining and Manufacturing Company ("3M"), with violating Sections 1 and 2 of the Sherman Act. The indictment (R. 2–23) charged that 3M had attempted to monopolize, engaged in a combination and conspiracy in restraint of, and conspired to monopolize interstate and foreign commerce in pressure-sensitive tape since 1931 (counts 1, 2, 3), in magnetic

recording media since 1946 (counts 4, 5, 6) and in aluminum presensitized lithographic plates since 1950 (counts 7, 8, 9). The grand jury investigation resulted from a complaint which the Department of Justice received from East St. Louis, Illinois, in 1958 about alleged antitrust violations in the magnetic recording tape industry (R. 86). The indictment alleged that the offenses charged were accomplished, among other means, by coercing competitors, through patent-infringement suits or threats thereof, into accepting restrictive patent-license agreements (*e.g.*, pars. 9(a), R. 5; 26(a), R. 12; 44(a), R. 18). All counts of the indictment alleged that the offense had been carried out in part in the Eastern District of Illinois, which includes both Danville and East St. Louis (*e.g.*, par. 28, R. 14).

The alleged violations were nation-wide and the government conceded, before any motion to transfer was made, that the case could have been filed in a number of other districts, including the Northern District of Illinois—where the office of the Antitrust Division in immediate charge of the investigation is located—and the District of Minnesota—where the defendant, a Delaware corporation, has its principal office (R. 30).

THE MOTION TO TRANSFER

On March 12, 1962, 3M filed a motion under Rule 21(b) of the Federal Rules of Criminal Procedure to transfer the case to the District of Minnesota, on the ground that such transfer "would be in the interest of justice" (R. 39). The principal facts relied

upon, as set forth in affidavits attached to the motion, were the following:

(a) The defendant's general and administrative offices, its research laboratories, and a large number of its manufacturing plants were located in or near St. Paul, and none of its 20 branch sales offices was located in the Eastern District of Illinois (R. 42).

(b) Numerous documents subpoenaed by the grand jury were examined by representatives of the Antitrust Division at St. Paul, and selected documents were then delivered to the Division's Chicago Office, together with about 15,000 other documents obtained in prior investigations (R. 42–43). Defendant's copies of these documents were located in the office of its general counsel at St. Paul or in the office of its trial counsel at Chicago (R. 44). All of these documents will eventually have to be taken to the place of trial; to require 3M to prepare and transport them to Danville would cause it additional expense (R. 44).

(c) An adequate defense would require the immediate availability at the trial of eight officers residing at St. Paul (R. 45).

(d) Trial at St. Paul would eliminate the need for local counsel other than the attorneys in the office of Minnesota Mining's general counsel (R. 46).

(e) Substantial additional expense would be incurred in on-the-scene preparation and trial of the case in Danville as against St. Paul (R. 43–44, 46–47).

(f) No competitor (with one possible exception) or alleged co-conspirator maintained a principal place of business in the Eastern District of Illinois; no meetings between the defendant and the alleged co-conspira-

tors were held there; and no witness who appeared before the grand jury resided there (R. 47–48, 76–77).

(g) The trial of the case in Minneapolis or St. Paul would have encountered no delay, as the district court dockets in those cities were current and the case load per judge was much smaller in the District of Minnesota than in the Eastern District of Illinois (R. 48–49, 80).

(h) St. Paul has better air and rail service than Danville (R. 78–79).

(i) The Chairman of 3M's Board of Directors, who for many years had been the company's chief executive officer, would have to spend substantial time at the place of trial. He was 75 years old and in poor health, and the physical hardship resulting from his participation in the trial would be lessened if the case were tried in Minneapolis where he would have ready access to his personal physician (R. 52).

The government filed counter-affidavits in which it relied upon the following facts:

(a) The defendant initiated and tried a substantial number of patent infringement suits in districts other than the District of Minnesota, although in a number of such cases venue lay in that district (R. 87–88). Such cases were brought in North Carolina, Kansas, California and New York, among other states (R. 90–95). In the trial of those cases 3M transported to "distant forums" "numerous" documents, executives, scientists, attorneys and equipment (R. 88). In one of those cases 3M participated in a four-week trial at East St. Louis (R. 88).

(b) In view of the defendant's 1961 gross sales of $608,000,000 and earnings in excess of $70,000,000, there was no danger that the added expense of trial in Danville would impair the quality of the defense (R. 88).

(c) A "substantial number" of the government's prospective witnesses live within a 300-mile radius of Danville, while only one or two minor witnesses live within 300 miles of St. Paul-Minneapolis (R. 89).

(d) The average case load per judge in the District of Minnesota as of February 28, 1962, was 170 (R. 101); in that district cases such as the present are ordinarily placed at the end of the docket (R. 99). The chief deputy clerk of that district believed that if the case were transferred there, it probably would not be brought to trial within a year (R. 99). While there were 327 civil cases pending in the Eastern District of Illinois as of June 30, 1961, that figure was not an accurate guide to the case load of Judge Platt, who sits in Danville, since most of those cases were pending in East St. Louis and would be tried before another judge (R. 102). As of February 28, 1962, Judge Platt had pending before him 92 civil and 2 criminal cases, as against the average case load in the District of Minnesota of 170 per judge (R. 102–103).

(e) A "speedy" trial was essential because the return of the indictment had not put an end to the alleged illegal conduct (R. 89).

Extensive oral arguments were had on June 14, and August 21, 1963, at which the factors pertinent to disposition of the motion were fully explored.

During the oral argument on June 14, 1962, counsel for the defendant suggested that disposition of the transfer motion involved the question of "where a fair trial can be held" (R. 127) and asserted that "a fair trial to the defendant can be held in St. Paul" (*ibid.*). Judge Platt then asked defense counsel how many 3M stockholders and employees reside in the St. Paul-Minneapolis area, because of the significance of such facts upon "obtaining * * * an impartial jury" in that area (R. 128). Judge Platt agreed with defense counsel that any stockholder could be challenged for cause by the government, but requested defense counsel to supply the number of stockholders and employees in the area (R. 128). The defendant submitted statistics showing that 17,153 stockholders and non-stockholder employees lived in Ramsey County, where St. Paul is located; and 5,425 in Hennepin County, where Minneapolis is located (R. 190). At the oral argument on August 21, 1962, defense counsel also pointed out that any possible prejudice which might occur from selecting jurors from the St. Paul-Minneapolis area could be obviated by drawing jurors from the rest of the District of Minnesota (R. 201).

THE DECISION OF THE DISTRICT COURT

On August 31, 1962, Judge Platt denied the motion to transfer. In an accompanying memorandum he separately discussed each of the ten factors which 3M had urged were pertinent criteria for determining whether the transfer would be in the "interest of

justice" (R. 220).[1] The court noted, *inter alia*, that the docket in Danville, without a doubt, would provide an earlier trial than the docket in the Minnesota District (R. 226); that those witnesses who are officers or employees of the defendant would find it more convenient if the case were transferred to St. Paul, but that Danville (according to the government's affidavit) was substantially closer and more convenient for the majority of the key government witnesses (R. 221–222); that it was difficult to determine, without the disclosure of evidence, where the greater number of the patent negotiations involved in the litigation had taken place (R. 222–223); that while it would be inconvenient for the defendant to transport to Danville those documents, necessary to trial, which are located in St. Paul, there was no claim that such documents were indispensable to the day-to-day operation of defendant's business (R. 223); that a trial in Minnesota would require the government to transfer nine heavy corrugated boxes containing more than 15,000 documents (R. 223); that in view of the size of defendant's operations and the number of its plants and their locations, the disruption to defendant's business which would result from trial in Danville, although greater than would be entailed by trial in St. Paul, should

[1] The factors were: (1) Location of corporate defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket condition of each district or division involved; (10) any other special elements which might affect the transfer (R. 220).

not be too great (R. 223–224); that a trial in Danville would be more expensive to defendant than a trial in St. Paul but would be less expensive to the government (R. 224); and that while defendant's legal department and retained patent lawyers are located in St. Paul, Danville would be easily accessible to the government attorneys and Minnesota Mining's outside attorneys, all of whom are in Chicago (R. 224).

The memorandum concluded with a section entitled "Special Elements of Hardship." Under that heading, Judge Platt first found that the Chairman of the Board of 3M would not be more severely taxed by a trial in Danville than in St. Paul (R. 226). Finally, as "one other item which cannot be overlooked," the court stated that in view of defendant's extensive activities in the St. Paul-Minneapolis area and the large number of contacts that its employees and stockholders had made there, "[i]t would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois" (R. 226–227).

THE DECISION OF THE COURT OF APPEALS

The respondent then petitioned the Court of Appeals for the Seventh Circuit to issue a writ of mandamus directing the transfer. The petition stated (R. 229) that Judge Platt had denied 3M "its right to a trial of the criminal case in its home district mainly on the ground that the government could not obtain a fair trial in the Federal Courts of the District of Minnesota," and that the denial of transfer "constitute[d] a severe abuse of discretion." The court of appeals

issued a rule to show cause why the writ should not issue (R. 233).

In a personally signed answer to the rule to show cause, Judge Platt denied that his "conclusion that it would be more difficult for the Government to obtain an impartial jury in the District of Minnesota" was "the sole or main ground for denying transfer * * *. Said factor was but one of a number of factors, all of which are fully set forth in respondent's brief, which led respondent to his conclusion. In the memorandum and order, respondent mentioned the numerous factors considered (adopting those advocated by petitioner) and pointed out that he had considered additional facts not there mentioned in the interests of brevity" (R. 234–235).

Judge Platt further stated (R. 236):

> This respondent gave consideration to all factors urged by petitioner and found several which militated against transfer. It appeared to respondent that the trial of the case would be delayed at least a year by the transfer, and the Government avowed a speedy trial was essential because some of petitioner's competitors are in financial straits owing to petitioner's alleged conduct and to the fact that petitioner has refused to halt its allegedly illegal activities; that the Government's witnesses may be inconvenienced if forced to travel to the northern city of St. Paul, Minnesota; that the Government's documents are already in Danville in the custody of the Clerk of the Court and would have to be transported to St. Paul; that transfer would increase the Government's expense because its witness' fees would be greater, as

> would cost of transportation of the Government's staff; that it would be more difficult for the Government to get an impartial jury in St. Paul than in Danville. It further appeared to respondent that petitioner has operated on a nation-wide scale in its business of licensing and selling in the industries here involved; that there is support for the Government's avowal that petitioner's overt acts have substantially affected the residents of the Eastern District of Illinois; that this is not an "imported" case; and that, considering all the evidence and facts in the over-all, trial in the Eastern District of Illinois would be in the "interest of justice."

As a footnote to the statement that "it would be more difficult for the Government to get an impartial jury in St. Paul than in Danville," Judge Platt noted that "both sides are entitled to a fair jury and obstacles thereto adversely affect the 'interest of justice'."

On February 27, 1963, the court of appeals, Chief Judge Hastings dissenting, granted the petition and ordered Judge Platt to transfer the case to Minnesota forthwith (R. 238–254). The court held (R. 243–247) that it was improper for Judge Platt to have taken into consideration the difficulty of obtaining an impartial jury in the District of Minnesota, and it stated (R. 240, n. 1) that it deemed this factor the most important element in his decision. The court also stated that it could not ignore "[t]he underlying spirit of the constitutional concern for trial in the vicinage of the defendant, rooted in centuries of Anglo-Saxon jurisprudence and universally recognized by the federal courts" (R. 243; see, also, R. 241, 242). The court concluded (R. 248) that

> * * * in addition to the demonstration by proof or admission of the essential elements of convenience, expense, and early trial, constituting "interest of justice" in a civil case * * * this criminal case is impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district * * *. Consequently, we are convinced that this multiple-venue criminal prosecution should be tried in the district of Minnesota, which is the home of petitioner.

In a footnote the court declared that "[a] trial in the Eastern District of Illinois will result in unjustifiable increased expenses to petitioner of at least $100,000, great inconvenience of witnesses, serious disruption of business and interference of contact between the petitioner's executives and its trial attorneys in connection with protracted antitrust prosecution trial"; and that although there was "no serious congestion" in the docket of the District Court of Minnesota, a division of the cases pending in the Eastern District of Illinois between the two judges of that district "would reveal a considerable case load for both of them" (R. 248).

Chief Judge Hastings, in dissent, concluded that "a consideration of all the factors relied upon by respondent fails to demonstrate any abuse of discretion and certainly none sufficient to justify the issuance of this extraordinary writ" (R. 251). He stated that acceptance of the majority's view would compel transfer of every multiple-venue Sherman Act prosecution to the district of the defendant's main office (R. 253). He also stated that the court of ap-

peals had no power to order transfer itself and should instead have directed Judge Platt to reconsider the motion (R. 253–254).

SUMMARY OF ARGUMENT

The court of appeals, upon reviewing by mandamus the district court's refusal to transfer this criminal antitrust case, concluded that one of the factors upon which the district court had relied—the difficulties of obtaining an impartial jury in the transferee district—was improper. But instead of remanding to the district court to reconsider without that factor, the court of appeals itself made a *de novo* examination of the record and concluded that "the interest of justice" required transfer. While in our petition for certiorari we did not challenge the court of appeals' use of mandamus to review the transfer order, upon further study of the problem we have concluded that such use was highly dubious. Where, as here, any use of the writ is questionable, the way it is actually used must be scrutinized with particular care to insure that it is not employed beyond its traditional function.

The limited function of an extraordinary writ is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so" (*Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26). In considering, as one of many factors bearing on the appropriateness of transfer the difficulty of obtaining an impartial jury in the transferee court, the district court neither acted beyond its jurisdiction nor abused

its power. Any error it committed was of the kind ordinarily not reviewable by extraordinary writ.

A. Rule 21(b) of the Federal Rules of Criminal Procedure provides for transfer of a criminal case where an offense was committed in one or more districts "if the court is satisfied that in the interest of justice" the proceeding should be transferred. This provision leaves the determination whether a particular case should be transferred to the discretion of the district judge. The factors to be considered and the weight to be given to them will ordinarily vary from case to case, and no fixed standards can be specified. In the present case the district court carefully considered a large number of factors bearing on the appropriateness of transfer. The court of appeals concluded that the district court had improperly taken into account alleged difficulties in obtaining a fair trial in the transferee district—a ruling we did not challenge. But the court of appeals committed clear error when it thereupon itself undertook a *de novo* examination of the record and exercised the discretionary function—which Rule 21(b) commits to the district court—of evaluating the various factors to determine whether a transfer would be in the interest of justice.

Mandamus cannot be used "to actually control the decision of the trial court * * *" (*Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383), or "to compel the court below to decide a matter before it in a particular way" (*In re Rice*, 155 U.S. 396, 403). The court of appeals, upon laying bare the error of

the district court, should have remanded to that court for reconsideration under the proper criteria; it had no warrant for itself undertaking to decide the ultimate "interest-of-justice" issue which Rule 21(b) commits to the discretion of the district court.

B. The court of appeals plainly erred in ruling that this case "is impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district" (R. 248). A criminal defendant has no constitutional right to be prosecuted in the district where he resides. His right is to be prosecuted in the district where the crime was committed. Both Article III, Section 2 of the Constitution and the Sixth Amendment specifically so provide. "The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed. * * * The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." (*United States* v. *Cores*, 356 U.S. 405, 407).

In the present case, the indictment charged that some of the acts constituting the alleged violations took place in the Eastern District of Illinois. That district was, therefore, the "vicinage of the crime" (*Johnston* v. *United States*, 351 U.S. 215–220), and venue was properly laid there. The location of the main office of a corporate defendant is significant only to the extent that any benefits to the defendant which result from trial near its home office bear upon whether a transfer would be "in the interest of justice."

ARGUMENT

THE COURT OF APPEALS MISUSED THE WRIT OF MANDAMUS WHEN, UPON RULING THAT THE DISTRICT COURT HAD CONSIDERED AN IMPROPER FACTOR IN DENYING TRANSFER, IT DIRECTED TRANSFER INSTEAD OF REMANDING TO THE DISTRICT COURT FOR THE EXERCISE OF ITS DISCRETION

Introduction

The district court, having "carefully reviewed the facts and circumstances relating to the transfer of this case," held that "in the interest of justice" the case should not be transferred (R. 227). The court of appeals undertook to review the refusal to transfer by writ of mandamus and, upon concluding that the district court had improperly taken into account one of the numerous factors upon which its decision was based, itself directed the transfer. In our petition for certiorari, we did not challenge the court of appeals' use of mandamus to review the denial of transfer, but urged that, upon concluding that the district court erroneously relied upon a particular factor, the appellate court should have remanded to the district court for reconsideration.

Upon further study of the problem—and particularly in the light of our analysis of the related question of the use of mandamus to review a transfer order in a civil case involved in *Van Dusen* v. *Barrack*, No. 80, this Term (see *infra*, pp. 19–22)—we have concluded that there is serious doubt whether an extraordinary writ may be used at all to review directly a district court's denial of transfer in the circumstances of this case. Since the use of mandamus presents a delicate problem of judicial administration involving the direct

interference by appellate courts in trial court proceedings, we believe that it is appropriate to bring the matter to the Court's attention. Furthermore, we think that the doubt as to the propriety of using the writ may properly be taken into account in determining whether the court of appeals, upon ruling that the district court's denial of transfer rested in part upon an improper factor, was warranted in itself directing transfer rather than remanding to the district court to reconsider without regard to that factor. For when it is questionable whether the writ should be used at all, the way in which it is used must be scrutinized with particular care to insure that its "office * * * [is not] enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction." *Bankers Life and Casualty Co.* v. *Holland*, 346 U.S. 379, 383.

Extraordinary writs are "reserved for really extraordinary causes" (*Ex parte Fahey*, 332 U.S. 258, 260), and their limited function is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so" (*Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26). Mandamus may not be used to review an interlocutory order where "the district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of judicial power" (*Roche, supra*, at 32). As we show below, the greater difficulty in selecting a jury in St. Paul than in Danville was a factor which the district court properly could con-

sider. There is great doubt whether mandamus may be used to review a transfer order on the ground that, in considering this factor, the district court took into account not only the difficulties in obtaining jurors who had no relationship with 3M, but also the possibility that the company's influence in St. Paul might be so pervasive as to make it difficult for the government to obtain a fair trial there. For in considering the latter possibility—and we have not sought review of the court of appeals' ruling that such consideration was improper—the district court neither acted beyond its jurisdiction nor abused its power. It committed only an error of the kind which ordinarily is not reviewable by extraordinary writ.[2]

In *Van Dusen* v. *Barrack*, No. 80, this Term, the government has taken the position that it is doubtful whether a court of appeals properly may utilize mandamus to review a transfer order in a civil case under 28 U.S.C. 1404(a), where the complaining party had failed to seek review under the Interlocutory Appeals Act. See our brief in that case, pp. 27–37.[3] There are several distinctions between this case and *Van Dusen* which on balance suggest that there is even less ground for review by mandamus in this criminal case.

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[2] The Fourth Circuit has broadly held that it will not review refusal to transfer under 21(b) by mandamus, but will consider such denial on appeal from any conviction. *United States* v. *Foster*, 296 F. 2d 249. Mandamus has been employed, however, to review transfer orders under Rule 21(b) where the case was transferred to a district in which venue allegedly did not lie. *United States* v. *Cashin*, 281 F. 2d 669 (C.A. 2); *United States* v. *Choate*, 276 F. 2d 724 (C.A. 5).

First. In *Van Dusen* the Interlocutory Appeals Act was available. There is no comparable provision for interlocutory appeals in criminal cases and, indeed, such appeals are strongly disfavored. See *Di Bella* v. *United States*, 369 U.S. 121, 129–130. While the lack of any direct review of interlocutory orders in criminal cases might be viewed as justifying review of such orders by mandamus, this fact also tends to emphasize the strength of the policy against *any* immediate review of such orders. See *Di Bella, supra*, at 130–131. Indeed, it was this policy which underlay the holding in *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, that a court of appeals had improperly used mandamus to correct a district court's alleged error in striking pleas in abatement to an indictment. The Court stated (*id.* at 32): "In issuing the writ the court of appeals below has done no more than substitute mandamus for an appeal contrary to the statutes and the policy of Congress, which has restricted the court's appellate review to final judgments of the district court."

Second. Van Dusen involves the construction of the transfer statute, and such a question of statutory interpretation may sometimes be of sufficient general importance to warrant immediate review. The present case, however, involves only the standards by which the district court is to exercise its discretion in passing upon transfer motions. In such cases the court of appeals ordinarily will not be called upon to enunciate any broad standards of general applicability—if they ever can be formulated in this area—but only to evaluate the validity of a standard con-

sidered in the light of the facts of the particular case. There would thus seem to be even less basis for review by mandamus in the present case than in *Van Dusen*.

Third. In one narrow respect there may be greater justification for the use of mandamus here than in *Van Dusen*. The alleged error of the district court in *Van Dusen* was a misinterpretation of the statute—*i.e.*, an improper construction of the phrase "where it [the transferred action] might have been brought"—and such error could be effectively corrected upon appeal from the final judgment of the transferee court. In the present case, however, it is doubtful how effective review of the transfer order would be after trial. As we show below, the court of appeals, upon laying bare the district court's error of having considered an improper factor, was required to remand the case to the district court to reexercise its discretion on the basis of the proper factors. If, after conviction, the court of appeals were to direct the district court to reconsider its earlier denial of transfer, the latter's inevitable reluctance to let a lengthy trial go to naught would be likely to influence its judgment as to whether, without considering the improper factor, it would have directed transfer.

Moreover, it may be extremely difficult for the defendant to demonstrate after trial that any erroneous exercise of discretion by the district court was prejudicial.[8] This condition suggests that to be mean-

[8] See *Scott* v. *United States*, 255 F. 2d 18 (C.A. 4) and *Blumenfield* v. *United States*, 284 F. 2d 46 (C.A. 8), in which the courts, in reviewing after conviction refusals to transfer under Rule 21(b), held that the trial court had not abused its discretion in retaining the case.

ingful review must be had before trial; but it also strongly indicates that such errors in denying transfer are not of sufficient importance to warrant use of an extraordinary writ to review them.

It is against the background of this unsettled and troublesome question whether the writ of mandamus is ever available to review a district court's alleged "abuse of discretion" in ruling on a Rule 21(b) motion that the Seventh Circuit not only undertook review by extraordinary writ, but after determining that one of the factors relied on by the district court was improper, ordered transfer of the case itself rather than remanding for the district court's reconsideration under proper criteria. We submit that the dubiety of any use of the writ to review a denial of transfer is relevant in judging whether the court of appeals erred on the merits, but even if we are wrong about the availability of the writ—or if we are barred from raising that question—the order directing the transfer should be reversed.

A. *The court of appeals, upon ruling that the district court had improperly considered a particular factor in denying transfer, should have remanded to the district court to reconsider under the proper standards*

Rule 21(b) of the Federal Rules of Criminal Procedure provides that the district court, upon motion of the defendant, shall transfer a criminal case to another district or division if the offense was committed in one or more districts or divisions and—

> if the court is satisfied that in the interest of justice the proceeding should be transfered to

another district or division in which the commission of the offense is charged.

This provision places the determination whether to transfer a case in the discretion of the district judge. The only standard provided is "the interest of justice," and transfer is to be made only if the court "is satisfied" that it would serve that interest. Whether "the interest of justice" would best be served by transfer of a particular case necessarily depends upon all the circumstances of that case, and no fixed standards can be formulated for making that determination. The factors to be considered and the weight to be given to them will ordinarily vary from case to case, and their evaluation in light of the general standard of "interest of justice" necessarily is committed to the informed discretion of the district judge. See *Holdsworth* v. *United States*, 179 F. 2d 933, 937 (C.A. 1); Notes of Advisory Committee on Rules, 18 U.S.C. following Rule 21.

The district court in the present case exercised its discretion against tranfer on the basis of extensive affidavits, briefs, and two days of oral argument. Judge Platt's memorandum discussed in detail the ten principal factors which 3M urged were pertinent in determining whether the case should be transferred—as well as other facts mentioned by counsel which he did not discuss in order to avoid lengthening his memorandum (R. 227)—and the court, having "carefully reviewed the facts and circumstances relating to the transfer * * * concluded that 'in the interest of justice' the cause should be tried in the Eastern District of Illinois" (R. 227). As Judge

Platt explained in his response to the rule to show cause, he found that there were "several [factors] which militated against transfer" (R. 236):

> * * * It appeared to respondent that the trial of the case would be delayed at least a year by the transfer, and the Government avowed a speedy trial was essential because some of petitioner's competitors are in financial straits owing to petitioner's alleged conduct and to the fact that petitioner has refused to halt its allegedly illegal activities; that the Government's witnesses may be inconvenienced if forced to travel to the northern city of St. Paul, Minnesota; that the Government's documents are already in Danville in the custody of the Clerk of the Court and would have to be transported to St. Paul; that transfer would increase the Government's expenses because its witness' fees would be greater, as would cost of transportation of the Government's staff; that it would be more difficult for the Government to get an impartial jury in St. Paul than in Danville.

Apart from Judge Platt's reliance upon the greater difficulty of obtaining "a fair and impartial jury" in the District of Minnesota than in the Eastern District of Illinois (R. 227; but see *infra*, pp. 28–29), the other factors which he enumerated plainly were pertinent criteria for determining whether to transfer. Indeed, if Judge Platt had relied solely on them in deciding against transfer, such a ruling could not have been successfully challenged as an abuse of discretion.

The court of appeals stated (R. 240, n. 1) that Judge Platt had treated "the alleged difficulty of getting a fair and impartial jury in the Minnesota district" as "the most important item" "relevant to a transfer," and it held that consideration of this factor was improper. But instead of remanding to the district court to reexercise its discretion without considering that factor, the court of appeals proceeded to make its own evaluation of the factors bearing on transfer;[4] ruled that the record demonstrated "the essential elements of convenience, expense and early trial, constituting 'interest of justice' in a civil case," and that in addition "this criminal case is impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district * * *" (R. 248); and concluded (*ibid.*): "[W]e are convinced that this multiple-venue criminal prosecution should be tried in the district of Minnesota, which is the home of petitioner."

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[4] In making this evaluation, the court of appeals stated in a footnote to its opinion (R. 248):

"There is no serious congestion in the docket of the District Court of Minnesota, while a division of the cases pending in the Eastern District of Illinois between the two judges of that district would reveal a considerable case load for both of them."

This statement is obviously based on 3M's evidence that the average case load per judge in the District of Minnesota was 141.5, while the average case load per judge in the Eastern District of Illinois was 163.5 (R. 80). As shown in the Statement (*supra*, p. 7), however, this comparison is not an accurate guide to the condition of Judge Platt's docket, since most of the cases in the Eastern District of Illinois are pending in East St. Louis and will be tried before another judge who sits there. The record shows that Judge Platt's case load at Danville was only 92 civil cases and 2 criminal cases (R. 102).

In short, the appellate court undertook a *de novo* examination of the record and itself exercised the discretionary function—which Rule 21(b) commits to the district court—of evaluating the various factors which determine whether a transfer would be in the interest of justice.

This was clear error. For whatever may be the propriety of using mandamus to review a transfer order in these circumstances (see the introduction, *supra*, pp. 18-22), if the writ is so used it cannot be used "to actually control the decision of the trial court * * *". (*Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383) or "to compel the court below to decide a matter before it in a particular way" (*In re Rice*, 155 U.S. 396, 403). The function of an appellate court which undertakes to review by mandamus the basis of a district court's discretionary denial of transfer is analogous to that of an appellate court reviewing an order of an administrative agency, which "exhaust[s]" its authority when it has "laid bare that error, * * * and, compell[ed] obedience to its correction * * *" (*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145). Here the error laid bare was the consideration of an improper factor; the method for correcting it was a remand to the district court to reexercise its discretion without considering that factor. The court of appeals had no warrant for going beyond that point and itself undertaking to decide the ultimate "interest of justice" issue which Rule 21(b) commits to the discretion of the district court.

This Court has strongly condemned a similar attempt by the court below to make a *de novo* determination of an issue in a criminal case which is committed to the discretion of the district court. In *United States* v. *Johnson*, 327 U.S. 106, the defendant filed a second motion for a new trial on the ground of newly discovered evidence which allegedly showed that Goldstein, one of the government witnesses against him, had committed perjury. The trial court carefully analyzed the supporting affidavits and concluded that, although they contained statements which would have been relevant and admissible at the original trial to discredit Goldstein's testimony, they "failed to prove that Goldstein had committed perjury, and that consequently the basic ground for the motion—that there was new evidence showing that Goldstein had perjured himself—was without foundation. That court found again [as it had in denying an earlier motion for a new trial based on the same claim] that the new and old evidence taken together affirmatively showed that Goldstein had been a truthful witness" (327 U.S. at 110). The court of appeals reversed. "The majority of the court reviewed parts of the affidavits and concluded from them that the trial judge's finding that Goldstein did not commit perjury was illogical and unreasonable. The majority substituted its own finding that Goldstein's original testimony was 'unerringly false' and held that the trial judge's contrary conclusion amounted to an abuse of discretion" (*id.* at 110–111).

This Court in turn reversed, holding that the court of appeals should have dismissed the appeal as friv-

olous (*id.* at 113). The Court held (*id.* at 112) that the record "shows clearly that the trial judge gave the numerous elements of the controversy careful and honest consideration"; that the trial court's findings were plainly supported by evidence (*ibid.*); that "it is not the province of * * * the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact" (*id.* at 111); and that the court of appeals "was wrong * * * when it did review the facts de novo and order the judgment set aside" (*id.* at 113). The same reasoning applies to the present case, and the court of appeals was equally "wrong" when, upon ruling that the district court had erroneously considered a particular factor, it undertook to "review the facts de novo" and made its own determination that transfer would be in the "interest of justice."

A remand in this case was particularly appropriate in view of the ambiguous character of the district court's alleged reliance on the difficulty in obtaining a fair trial in Minnesota. In his memorandum Judge Platt, after pointing to the "many" employees and stockholders which 3M has in the St. Paul area and the many positions which the company's officers and employees hold in financial, civic and educational institutions there, stated that "when one considers the number of contacts that its employees and stockholders have made over the area, and the pride that the community in that area would have, and should have, in 3M, there might exist a very severe influence on any

citizen in the area called for jury service" (R. 226–227). He then concluded (*ibid.*): "It would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois."

The latter statement may have related only to the difficulties of obtaining an impartial jury in St. Paul rather than to the likelihood that no fair and impartial jury could be obtained there. That is, Judge Platt may have been merely recognizing that, because of 3M's position in St. Paul, it might take longer and be more arduous to select a proper jury in St. Paul than in Danville. If that is what Judge Platt meant by his reference to the difficulty of obtaining an impartial jury in St. Paul, it would be just as valid a consideration against transfer as the other factors indicating that transfer would delay the ultimate disposition of this important antitrust case.

As we read the court of appeals' opinion, the court did not question the propriety of considering the possible delay and difficulties in picking a proper jury if the case were tried in St. Paul; it held only that the district court had improperly considered whether a fair trial could be had at all in that city. Since the court of appeals may have misinterpreted the district court's ruling on this issue, and since there is also disagreement between the two courts over how important this factor was in the district court's decision (see the Statement, *supra*, pp. 11–13),[5] due respect for

[5] In his response to the rule to show cause, Judge Platt stated (R. 234–235) that the difficulty of obtaining an impartial jury in St. Paul was not "the sole or main ground for denying transfer" and was "but one of a number of factors" which led to that conclusion. The court of appeals stated (R. 240, n. 1),

the district court's broad discretion in transfer cases required the court of appeals, upon concluding that the district court had erred in considering whether a fair trial could be had in St. Paul, to remand to that court for reconsideration.

The proper disposition is illustrated by the Seventh Circuit's own decision in *Chicago, R. I. & P. R. Co.* v. *Igoe*, 212 F. 2d 378. There the district court (Judge Igoe) had refused to transfer a civil case under 28 U.S.C. 1404(a) on the ground that the transfer statute does not apply to cases that had been instituted in a state court and removed to the federal court. The court of appeals held that the district court had erred in denying transfer on that ground, but refused itself to decide whether to transfer and remand to the district court to make that determination. It stated (212 F. 2d at 382): "Ultimate decision on that motion is within the province of the District Court, and we cannot, as petitioner would have us do, usurp its function and decide the question in this court."* See, also, *Evaporated Milk Association* v. *Roche*, 130 F. 2d 843 (C.A. 9), reversed, 319 U.S. 21; *United States* v. *Choate*, 276 F. 2d 724, 729 (C.A. 5).

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however, that "we are convinced" that this factor was "the most important item" in Judge Platt's decision.

*Upon the remand the district court, after considering the relevant factors, concluded that transfer would not be for the convenience of the parties and the witnesses or in the interest of justice. The railroad again sought a writ of mandamus and the court, sitting *en banc*, reversed Judge Igoe's determination and directed him to transfer the case, over the strong dissent of Judge Finnegan. *Chicago, R. I. & P. R. Co.* v. *Igoe*, 220 F. 2d 299, certiorari denied, 350 U.S. 922.

B. *In determining whether transfer of a criminal case is "in the interest of justice" under Rule 21(b), the fact that the main office of the corporate defendant is in the transferee district is itself irrelevant*

In deciding that "this multiple-venue criminal prosecution should be tried in the district of Minnesota, which is the home of petitioner" (R. 248), the court of appeals gave heavy, if not dispositive, weight to its view that criminal defendants have a right to be tried in their home districts. Thus, the court referred to the Constitutional safeguard "against opening the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense" (R. 241), and to "[t]he underlying spirit of the constitutional concern for trial in the vicinage of the defendant, rooted in centuries of Anglo-Saxon jurisprudence and universally recognized by the federal courts" (R. 243). Immediately prior to its ultimate conclusion that this case "should be tried" in St. Paul, "the home of petitioner," the court stated (R. 248) that in addition to the elements which in its view demonstrated that transfer would be in the "interest of justice," "this criminal case is impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district * * *."

The court was clearly in error. A criminal defendant has no constitutional or historical right to be prosecuted in the district where he resides; his right is to be prosecuted in the district where the crime was committed. It is that right, and that right alone, which the Constitution protects.

The Constitution is explicit on the point. Article III, Section 2 provides that "The Trial of all Crimes * * * shall be held in the State where the said Crimes shall have been committed * * *"; and the Sixth Amendment guarantees the accused "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *." "The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed. * * * The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place" (*United States* v. *Cores*, 356 U.S. 405, 407). "This requirement of venue states the public policy that fixes the situs of the trial in the vicinage of the crime rather than the residence of the accused" (*Johnston* v. *United States*, 351 U.S. 215, 220–221).

The court of appeals was under the misapprehension that "vicinage" refers to the residence of the defendant. At common law, the term "vicinage" meant the neighborhood from which the jury was to be drawn, which was "the county where the fact is committed." 4 Blackstone, *Commentaries* 350 (Lewis ed., 1900).[7] Vicinage was therefore the place of the

[7] 4 Blackstone, *Commentaries* 350 (Lewis ed., 1900):

"When, therefore, a prisoner on his arraignment hath pleaded *not guilty*, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto* [free and lawful men of the vicinage]; that is, freeholders, without just exception, and of the *vicne* or neighborhood; which is interpreted to be of the county where the fact is committed."

crime, not the home of the defendant. It is this right which the Constitution protects and, consistent with this view, it has long been settled that venue is proper in the district where the crime has been committed, even though the defendant resides elsewhere. *In re Palliser*, 136 U.S. 257, 265; *Johnston* v. *United States*, *supra*.

In the present case, the indictment charged that some of the acts constituting the alleged violations of the Sherman Act took place in the Eastern District of Illinois. That district was, therefore, the "vicinage of the crime" (*Johnston, supra*), and venue was properly laid there. Indeed, Rule 21(b) presupposes that venue is correct, since it permits transfer only if "it appears * * * that the offense was committed in more than one district or division" and only "to another district or division in which the commission of the offense is charged." If the venue had been improperly laid in Danville, the appropriate procedure would have been a motion to dismiss, not a motion to transfer.

The fact that the transferee district is the home of the defendant—or, in the case of a corporation, its main office—thus has no independent significance on whether transfer to that district would be "in the interest of justice." Of course, trial at the place of a corporation's main office may have advantages for it, such as ease of transporting records and convenience of attendance of company personnel and counsel. But the significant thing is the consequences which flow from trial near the home office, and not the isolated fact of trial at that place. Indeed, there may

be cases in which trial at the home office would not be advantageous to the company, such as where the pertinent records and personnel were located at a distant branch office.

In the present case, 3M presented to the district court various reasons why trial in the District of Minnesota would be more convenient to it. The government presented other considerations favoring trial at Danville. The district court, in denying transfer, recognized that there would be additional burdens upon 3M, but concluded that these burdens were not so substantial as to outweigh the arguments in favor of retaining the case.

The evaluation of the competing factors was within the district court's discretion (see *supra*, pp. 22–23). When the court of appeals concluded that the district court had improperly considered another factor, it was required to remand to the district court for reconsideration. On reconsideration the district court might conclude that, without the irrelevant factor, the case should be transferred, or it might decide still to retain the case. But unless it is clear that without considering the improper factor the district court would have no alternative but to transfer, the court of appeals has no basis for directing transfer. Transfer could be mandatory only if there were a policy favoring trial of Sherman Act cases at a corporate defendant's home office so strong that it must prevail unless there are overwhelming counterbalancing factors in the particular case. As we have shown, there is no such policy. The defendant's constitutional right is to be tried in the district where the

crime was committed. That right would be fully vindicated by trial of the present case in the Eastern District of Illinois, where the offenses charged in the indictment are alleged to have been committed in part.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals directing transfer should be reversed, and the case remanded to the district court for further proceedings.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS,

Petitioner,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 113

THE HONORABLE CASPER PLATT, CHIEF JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS,

Petitioner,

v.

MINNESOTA MINING AND MANUFACTURING COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals ordering petitioner to transfer this case to the District of Minnesota pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure is reported at 314 F.2d 369 (R. 238-254). Petitioner's Memorandum and Order in the district court denying respond-

ent's motion to transfer, entered August 31, 1962, is reported unofficially in 1962 Trade Cas. ¶ 70,455 (E.D. Ill. 1962) (R. 219-227).[1]

QUESTIONS PRESENTED

1. Did the court of appeals abuse the discretion granted it under the All Writs Act when it ordered petitioner to allow defendant's transfer motion on this record where (a) petitioner's denial of the motion was based on a concededly improper consideration constituting an abuse of the discretion vested in him under Rule 21(b), (b) the uncontested record facts demonstrate that allowance of defendant's motion to transfer is in the interest of justice, and (c) petitioner had fully considered the relevant and uncontested record facts and had found in them no basis for denial of the motion to transfer.

2. In considering the interest of justice under Criminal Rule 21(b), what weight should be given to the fact that the proposed transferee district is the home district of the defendant in a case in which there is no substantial reason for trial in the district where the indictment was returned.

STATUTE AND RULE INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a), provides:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or ap-

[1] Throughout this brief, the petitioner, Chief Judge Platt, is identified as "petitioner" and the respondent, Minnesota Mining and Manufacturing Company, as "defendant". References to the Petition for Certiorari are designated "Pet." and to petitioner's brief on the merits, "P. B." Emphasis in quotations is added.

propriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Rule 21(b) of the Federal Rules of Criminal Procedure provides:

> "The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

STATEMENT

A. THE INDICTMENT.

The nine-count indictment was returned on December 13, 1961, by a grand jury sitting in Danville, a city with a population of about 40,000 located in central Illinois, roughly midway between Chicago and St. Louis,[2] in the Eastern District of Illinois (R. 2). It charges, under Sections 1 and 2 of the Sherman Act, that the defendant, Minnesota Mining and Manufacturing Company, which has its home offices in St. Paul, Minnesota, has attempted to monopolize and engaged in a combination and conspiracy in restraint of, and conspired to monopolize, interstate and foreign commerce in pressure sensitive tapes since 1931 (Counts 1, 2, 3), in mag-

[2] The record shows Danville to be between 130 and 190 miles south of Chicago, depending on the starting point in Chicago (R. 174, 176), and Rand McNally's Road Atlas indicates a distance of about 190 miles between Danville and St. Louis.

netic recording media since 1946 (Counts 4, 5, 6), and in aluminum presensitized lithographic plates since 1950 (Counts 7, 8, 9). Although the paragraphs of the indictment dealing with "Jurisdiction and Venue" (R. 8, 14, 20) allege generally that the offenses complained of were carried out in part within the Eastern District of Illinois, the indictment does not charge that any specific act complained of took place anywhere within that district.

B. THE MOTION TO TRANSFER.

1. Preliminary Proceedings.

Defendant attempted, first informally (R. 24-29), and then by motion for a bill of particulars (R. 32-37), to obtain information necessary to determine (1) whether venue existed in the Eastern District of Illinois and (2) whether a jurisdictional basis existed for filing a motion to transfer to its home district, the District of Minnesota, or failing that, to Chicago in the Northern District of Illinois. The government would stipulate only that venue would lie in those districts (R. 30). Petitioner denied defendant's motion for bill of particulars (R. 38).

Defendant then filed, on March 12, 1962, a motion to transfer this case to the District of Minnesota supported by nine affidavits (R. 41-85) of defendant's officers and counsel covering these subjects: the location of the defendant; the location of every prospective witness known to defendant on both sides of the case; the place where the events constituting the alleged crime took place; the location of the documents and records involved; the extensive and

serious disruption of defendant's business that would result from trying the case in Danville rather than in defendant's home district and the great added expense of a Danville trial to defendant; the location of counsel; the relative accessibility of the two proposed forums for witnesses known to be coming from other parts of the country; and the docket condition in each district. The government, on April 1, 1962, filed two affidavits (R. 86-110) of its trial attorneys, one relating to docket conditions and one containing the general averments about defendant's wealth and asserted guilt and the alleged convenience of an undisclosed number of unidentified witnesses, set forth at P.B. 6-7.

2. The Introduction of The Fair Trial Issue.

Nowhere, either in the defendant's affidavits or the government's, was there any suggestion that the government, or the defendant, might not receive a fair trial in either forum. At the hearing on the motion on June 14, 1962, defendant's counsel directed petitioner's attention to *United States* v. *Erie Basin Metal Prods. Co.*, 79 F. Supp. 880, 885 (D. Md. 1948), which lists among several factors relevant to a determination of the interest of justice in a transfer situation, "the promotion of a *speedy* and at the same time a fair trial. . . ." (R. 127). Before counsel could explain the relevance of this quotation to the docket conditions in the two proposed forums, petitioner interrupted with a series of questions about the number of defendant's stockholders, employees, and executives in St. Paul, finally explaining, "What I am referring to is obtaining a jury up there [in St. Paul], *an impartial jury*" (R. 128). Defendant's counsel

pointed out that no such problem could arise in a community of more than a million, especially as stockholders and employees called for jury duty would certainly be challenged for cause. But, petitioner persisted, "there are *fellow sympathizers* with [defendant] . . . there . . . [and defendant has] been located there for a good many years . . . [and] no doubt the officers and directors have been very active in various civic organizations up there and in that way . . . have built up a favorable attitude toward the corporation, and *it might have an effect upon a jury*. . . . I think those are things that ought to be considered . . ." (R. 128-130). Counsel for defendant pointed out that such facts had not been considered in any of the decided cases and that defendant, like other corporations and people, had probably made as many enemies as friends, but he offered to give petitioner whatever information he wanted (R. 129-130).

Close to the beginning of his answering argument, government counsel noted that the "court [had] raised a very important question" and assured petitioner that the government could "prove out of the mouth of a witness . . . that . . . the Government, will not get a fair and impartial trial in St. Paul" (R. 135). This "proof" he provided by reading an excerpt from page 6856 of the grand jury transcript which dealt with defendant's decision to test, outside the Twin Cities (R. 178), a new product, the Jewett plate used only by printers (R. 203). On the basis of this excerpt, taken from a transcript that defendant and its counsel have never seen, government counsel declaimed, "I am . . . interested in the Government receiving a fair and impartial trial

for the Government, and . . . *I challenge where any court would decide that the Government can get a fair trial in Minneapolis or St. Paul*" (R. 178). "I know [that] in this district [Danville] both . . . will get a fair trial. I know the Government won't in Minneapolis or St. Paul" (R. 179).

Counsel for defendant thereafter filed the information petitioner requested (R. 128, 180, 187-191, 197-198) establishing that employees or stockholders of defendant numbered less than 1% of the total population of 3,413,684 from which juries may be drawn in the Minnesota district and less than 2% of the population of 1,619,019 in the divisions in which the trial would probably be held, and that in the metropolitan Twin Cities area, employees of the United States Government outnumbered defendant's (R. 191).

At the continued oral argument on August 21, 1962 (R. 192), government counsel reiterated that the government could not "get a fair trial" (R. 194) or "a fair and impartial trial" (R. 197) in Minnesota and presented unverified information about defendant's charitable contributions and the participation by its officers, directors, and employees in civic and other organizations in the Twin Cities (R. 194-195, 205).

3. The Sworn, Documentary Evidence Produced by Defendant.

The affidavits that defendant filed in the district court in support of its motion to transfer to Minnesota, admitted or standing uncontroverted in the record, establish the following:

Location of parties and records. Defendant's home offices, general and administrative, its main research laboratories, and several of its manufacturing plants are located in St. Paul, Minnesota. Defendant has no facilities, not even a branch sales office, in the Eastern District of Illinois (R. 42, 46, 60). All but two of defendant's eleven directors and twenty-nine corporate officers, live in or near St. Paul, Minnesota; none lives in the Eastern District of Illinois (R. 41-42). Trial counsel on both sides are in Chicago (R. 42, 76), but defendant's general counsel and patent counsel, who have served defendant for many years (from 1937 and 1929 respectively), are located in St. Paul (R. 41, 42, 66). Beside its copies of the 15,000 documents already furnished the government, defendant's general corporate files (4,000 file drawers), its operating division files (over 300 drawers), and its patent attorney's files (15 cabinets) are all located in St. Paul (R. 71-72). Eleven alleged co-conspirator corporations are located on the East Coast or in the Chicago area (R. 8, 14-15, 20-21).

Events in issue. "In the main, the indictment charges the defendant with improper use of its patents in coercing competitors to accept patent license agreements . . ." (R. 222). No patent licensee, no alleged co-conspirator, no direct competitor is located within the Eastern District of Illinois (R. 48, 63, 67-68, 77-78). Defendant's executives in charge of the products, patents, patent licenses and negotiations involved in the indictment know of no event relating to these matters that took place and no prospective witness who lives in the Eastern District of Illinois (R. 47, 48, 51, 55, 59, 63,

77). Such events have on many occasions taken place in St. Paul (R. 48, 51, 55, 59, 63) and decisions concerning such matters have been made in St. Paul where defendant's home offices and patent counsel are located (R. 66).

Disruption of business and unjustifiable expense. In order adequately to defend against the charges of this indictment, it is essential that some of defendant's principal executives, who work and live in the Twin Cities area, be present at the place of trial throughout the time of final preparation for, and actual trial of, this case, both because of their knowledge of the product lines and the patent licenses involved in the indictment (R. 44-45) and because many of them will be important defense witnesses (R. 47, 79). Similarly, the presence of subordinates who have had responsibility in the areas covered by the indictment and who also live in or near St. Paul will be necessary at the trial both in advisory and testimonial capacities (R. 55-56, 60, 64). General and patent counsel from St. Paul will have to be present before and during the trial (R. 43-46), and contact between corporate executives and all counsel will be easier, less expensive, less disruptive of defendant's business, and more apt to assure defendant adequate representation if the trial is held in St. Paul (R. 46-47, 52, 56, 60, 64). Moreover, the removal of personnel and records to Danville necessary to an adequate defense would cause serious disruption of defendant's normal business activity at all levels (R. 55-56, 60, 64, 71-73).

The cost to defendant of trial in Danville instead of St. Paul, not including transportation, facilities for witnesses,

office space for executives and compensation of local counsel, will exceed $100,000 (R. 47, 75).

Convenience of witnesses. Defendant's affidavits show the names and locations of all known prospective witnesses: those named as co-conspirators, its own witnesses, and the witnesses who testified before the grand jury (R. 76-78). None can be found within the Eastern District of Illinois (R. 77). Those who live outside the Twin Cities area are almost all located on the East Coast (New York, Boston, Philadelphia, etc.) or in Chicago (R. 8, 14-15, 20-21, 48, 77-78). Accordingly, one of defendant's affidavits details the train and plane schedules between New York and Chicago and the two proposed forums (R. 76-85). Danville must be reached through Chicago (R. 78), but only three planes and three trains reach Danville daily from Chicago, and the schedules are such that it would be necessary for anyone who had to attend a morning session to arrive in Danville the night before (R. 84). On the other hand, the Twin Cities Airport is served by seven airlines with more than 100 daily flights, 36 from Chicago. There are 18 flights daily between New York and the Twin Cities and 40 non-stop flights daily between New York and Chicago (R. 78). A witness or other interested person leaving Chicago at 8:00 a.m. can arrive in St. Paul at 9:05 a.m. in time to attend a morning court session (R. 82-85).

Docket conditions. The dockets of the District Court of Minnesota are current (R. 48). The case load in the Dis-

trict of Minnesota on June 30, 1961 was 141.5 cases per judge (R. 80); on July 31, 1962, it was 134 cases per judge (R. 186). In the Eastern District of Illinois on June 30, 1961, the case load was 163.5 per judge (R. 80).

4. The Government's Answering Avowals.

In answer to defendant's sworn evidence, the government filed two affidavits of its attorneys (R. 86-110), one entirely about dockets[3] and the other containing the unsubstantiated assertion that some of the government's witnesses, whose names and locations were not disclosed, would find it more convenient to get to Danville than St. Paul (R. 89). The second affidavit also contained assertions, as set forth at P.B. 6-7, about patent suits in which defendant had previously participated outside the Twin Cities area, defendant's income and assets, and the continuance of as yet unproved illegal activity (see pp. 50-53, *infra*). At the oral argument, government counsel, with petitioner's permission (R. 137, 178), discussed at length the evidence purportedly presented to the grand jury covering the 30-year period involved in the indictment (R. 137-163). Nowhere in this extensive argument is there any suggestion that any event material to proof of the crimes alleged in the indict-

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[3] The government's affidavit does not contradict defendant's affidavits (pp. 10-11, *supra*) on this point, but shows that on February 28, 1962, petitioner's calendar included 92 cases originally brought in his division and 17 cases transferred to it from the other division of the district (R. 109-110).

ment took place in the Eastern District of Illinois[4] or that *any* prospectfve government witness is located in the Eastern District of Illinois.

C. PETITIONER'S DECISION DENYING TRANSFER.

On August 31, 1962, petitioner entered his memorandum and order denying defendant's motion to transfer. He found it "material in determining where the cause should be tried" that "it would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois" on the following rationale (R. 226-227):

> "For more than 50 years 3M has had many employees and stockholders in the St. Paul area. 3M has grown from a small corporation to an industrial giant while located in the St. Paul area. Its officers and employees have been active in civic affairs. They hold official positions in over thirty-three financial, civic, and educational institutions. All of these activities are to the credit of 3M, but at the same time when one considers the number of contacts that its employees and stock-

[4] The government did assert at oral argument that it will be able to establish venue in the Eastern District of Illinois although it did not suggest how for the counts involving one of the three disputed product lines; on the other two product lines the government pointed to two letters (dated 1953 and 1958) that refer to customers located in the Eastern District of Illinois (R. 154-155) and defendant's appearance as an involuntary party plaintiff in one patent suit brought in East St. Louis (R. 66-67, 159). Defendant stipulated venue in the Eastern District of Illinois for purposes of the transfer motion only; defendant could not move to dismiss, as petitioner suggests it should have done (see P.B.33), because petitioner denied defendant access to the facts that would be needed to support such a motion (see p. 4, *supra*).

holders have made over the area, and the pride that the community in that area would have, and should have, in 3M, there might exist a very severe influence on any citizen in the area called for jury service. It also must be noted that the charge in the indictment is a misdemeanor, and that the Government and the defendant each have but three peremptory challenges. Rule 24(b), Federal Rules of Criminal Procedure, 18 U.S.C.A. Counsel for the defendant, in his argument, has made the suggestion that the jury might be drawn from outside the counties of Ramsey and Hennepin where there isn't the concentration of officers, employees and stockholders of 3M. The influence of 3M and its personnel would probably make itself felt among the citizens in the counties adjacent to Ramsey County where St. Paul is located and to Hennepin County where Minneapolis is located. . . . See United States v. Hoffa, D.C.S.D. Fla., 1962, 205 F. Supp. 710, 722."

Petitioner discussed the record created by the affidavits factor by factor, but none of these considerations provided a salient reason for denial of transfer. With respect to the events in issue, petitioner wrote that "it is difficult . . . to determine without the disclosure of evidence . . ." where they took place but that "the defendant would not suffer if the Government would fail to prove venue, because the indictment or counts in the indictment so affected would have to be dismissed" (R. 222-223).

With respect to convenience and hardship, he recorded that the District of Minnesota is the "home District of the defendant" (R. 224) where its "principal place of business . . . its main research laboratory and several manufacturing

plants . . ." are located (R. 231); that the interested attorneys are located in Chicago and St. Paul (R. 224); that "witnesses who are officers or employees of the defendant will find it more convenient if the case was transferred . . ., but as to other witnesses, the question of inconvenience is not so easily determined" (R. 222); that defendant's personnel and witnesses coming from St. Paul can get to Danville "by automobile in about twelve hours . . ." (R. 225) and "defendant also operates its own planes" (R. 226); that "there are direct air flights from New York to Minneapolis-St. Paul [which] . . . might accommodate the witnesses from . . . New York . . ." (R. 224-225) and "more rail and air connections between Chicago and St. Paul than between Danville and Chicago . . . [but] Danville can be easily reached from Chicago . . . by automobile, air, or train . . ." (R. 224); that the "trial" and "transporting [of] its officers and employees as witnesses" would "be more expensive to the defendant . . ." in the Eastern District of Illinois but "witness fees to be paid by the Government would be less . . . in Danville . . ." (R. 224); that "there can be little doubt that . . . trial . . . in St. Paul . . . would . . . [entail] less disruption of defendant's business . . . but when consideration is given to the size of defendant's operations, the number of its plants, and their locations, the interruption of defendant's business should not be too great" (R. 223-224); that "it would be an inconvenience for the defendant to locate and transport the necessary documents" to Danville, but that if transfer were granted, the government would have to move nine corrugated file boxes to Minnesota (R. 223).

With respect to dockets, petitioner stated that "without a doubt" this case could be tried at an earlier date in Danville because at the time there were "but two criminal trials pending on the Danville docket, and these are set for trial September 19 and 20" (R. 226).

D. PETITION FOR WRIT OF MANDAMUS AND ANSWER TO THE RULE TO SHOW CAUSE.

On September 15, 1962, defendant filed its petition for writ of mandamus, with supporting brief, in the Court of Appeals for the Seventh Circuit (R. 228). In petitioner's answer to the rule to show cause and his supporting brief, filed on November 1, 1962 (R. 234), petitioner defended his consideration of the "fair trial" factor—"that it would be more difficult for the Government to obtain an impartial jury in . . . Minnesota . . ."—and also urged that the remainder of the record justified denial of transfer (R. 234-236).

With respect to defendant's overwhelming showing that transfer would be in the interest of justice, petitioner said that it did not appear to him that defendant's "every assertion must be taken at face value . . ." because the inconvenience of trial in Danville could be reduced by the use of long distance telephone and defendant's private planes and, moreover, defendant "was temporarily willing to assume all such inconvenience and expense just to have the trial in Chicago"[5] (R. 237).

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[5] Nothing in the record supports this reference to Chicago. Defendant did ask for venue information about the Northern District of Illinois, which includes Chicago, at the same time that it asked about the District of Minnesota (see p. 4, *supra*) but having obtained the government's stipulation that venue would lie in both of those districts, defendant filed its motion to transfer to Minnesota.

E. THE OPINION OF THE COURT OF APPEALS.

On February 27, 1963, the court of appeals issued a writ of mandamus ordering the case to be transferred to the District of Minnesota (R. 238, 255). The court of appeals viewed petitioner's assertion that it would be difficult to get "a fair and impartial jury in the Minnesota District" to be the "most important item" in his decision to deny transfer (R. 240, n. 1) and found that "the only meaningful purpose which can be attributed to the language used is that the court believed that there was a *likelihood* of the government not receiving a fair jury trial in Minnesota" (R. 243-244) which amounted to speculation about "the efficacy of the operations of a federal court of concurrent jurisdiction in another district. . ." (R. 247). The court ruled that "no order in any way based upon such reasoning can stand, even under the guise of an exercise of discretion" (R. 247).

The "fair trial" consideration had become determinative, the court found in the context of a record which demonstrated, "by proof or admission . . . the essential elements of convenience, expense and early trial, constituting 'interest of justice' in a civil case . . ." (R. 248):

> "A trial in the Eastern District of Illinois will result in unjustifiable increased expenses to [defendant] of at least $100,000, great inconvenience of witnesses, serious disruption of business and interference of contact between the [defendant's] executives and its trial attorneys in connection with protracted antitrust prosecution trial.

> "[Defendant] has no office, plant or other facility in the Eastern District of Illinois.
>
> "There is no serious congestion in the docket of the District Court of Minnesota, while a division of the cases pending in the Eastern District of Illinois between the two judges of that district would reveal a considerable case load for both of them."

Petitioner had, moreover, "ignored" the "underlying spirit of the constitutional concern" that "a defendant . . . [in a criminal case] be prosecuted [if possible] in its own environment or district . . ." (R. 243, 248). Accordingly, the court of appeals issued its "writ of mandamus directed to [petitioner] . . . ordering him to transfer [this criminal action] . . . to the District of Minnesota" (R. 248).[6]

F. THE PETITION FOR CERTIORARI AND PETITIONER'S BRIEF ON THE MERITS.

In his petition for writ of certiorari to this Court, filed April 29, 1963, petitioner expressly denied that he sought "review of the correctness of the Seventh Circuit's holding that it was impermissible to take into account the difficulty of assembling an unbiased jury" in the proposed transferee court (Pet. 12, n. 2). He conceded that his decision merited

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[6] Chief Judge Hastings, dissenting, agreed that no order based on speculation about the ability of a sister court to provide a fair trial should stand, but asserted, without any explanation, that he did not believe that petitioner had done so (R. 252); he also suggested that, as petitioner claimed his decision to have been based on the whole record, the proper procedure would have been to issue a writ remanding the case to petitioner for a decision based on the record exclusive of the improper "fair trial" factor (R. 253-254).

the court of appeals' issuance of a writ of mandamus, and he asked review only of its terms (Pet. 2; see also Pet. 13; P.B. 2).

In his brief on the merits to the Court filed October 1, 1963, when these questions were already barred by the Court's Rule 40-1(d)(2), petitioner has urged that his decision on fair trial might have been misunderstood by the court of appeals and the error might have been less serious than he had conceded it to be (P.B. 18-19, 28-29). He has also raised a belated question as to the existence of power in the court of appeals to compel the result dictated by the interest of justice on this record (P.B. 17).

SUMMARY OF ARGUMENT

To allow petitioner's decision here to stand would be, as the appellate court recognized, to repeal Criminal Rule 21(b).

I. The Court has made it clear that appellate courts can and should exercise the discretion given them in the All Writs Act to exert a proper and necessary "supervisory control" over the district courts (*LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260 (1957)) in cases involving, as this case does, abuses and usurpations of power in the application of a procedural rule "which by law it is the duty of this Court to formulate and put in force" (*Los Angeles Brush Mfg. Corp.* v. *James*, 272 U.S. 701, 706 (1927)) where "no other remedy will suffice." *DiBella* v. *United States*, 369 U.S. 121, 125, n. 4 (1962). The availability of other remedies in *civil* cases cannot affect the power and duty of the appel-

late courts to use the writ to prevent otherwise irremediable usurpations of power in the application of a *criminal* rule touching "closely the fair administration of criminal justice and public confidence in it. . . ." *United States* v. *Johnson*, 323 U.S. 273, 276 (1944).

II. A. The petition for certiorari conceded that the credence petitioner gave to the unsubstantiated claim that the government could not obtain a fair trial in the proposed transferee court warranted, in itself, the use of the extraordinary writ of mandamus. The court of appeals held, on the basis of settled law, that such speculation about the efficacy of the operations of a court of concurrent jurisdiction constitutes an unlawful appropriation of the power of that court and that no decision "in any way based on such reasoning" should stand. The claim, made for the first time in petitioner's brief on the merits, that the court of appeals misunderstood petitioner's ruling on this point, examined in the light of the history of the issue as shown in the record before this Court, is exposed as wholly unsupportable.

B. Moreover, here the only basis for the claim of probable unfairness in the proposed transferee court is, in effect, that it sits in the home district of the defendant. Petitioner's decision thus directly contravened the "policy of relieving the accused, where possible, of the inconvenience incident to prosecution in a district far removed from his residence" (*United States* v. *Cores*, 356 U.S. 405, 410 (1958))—a policy given voice in the Declaration of Independence and so foundational to our legal institutions that this Court has termed it a "constitutional policy"

(*United States* v. *Johnson*, 323 U.S. 273, 276 (1944))—and he did so despite the intention that Rule 21(b) would effectuate that policy in multi-venue antitrust cases.

III. A. Petitioner has objected to the appellate court's examination of the record here and claims that, having found abuse in the consideration of the improper "fair trial" issue, the appellate court should then have remanded instead of directing transfer forthwith. But extraordinary writs are not to be vainly or unnecessarily used. Unless the record disclosed that, the "fair trial" factor removed, a different ultimate decision was at least possible, it is doubtful that the appellate court would have been justified in making use of an extraordinary writ, even one merely ordering remand. Indeed, in the arguments before the appellate court petitioner himself urged the record as a whole, all of which was documentary, as support for his ultimate determination that transfer should not have been allowed. The court of appeals was therefore compelled to examine the record in order properly to determine whether even remand would be in order.

B. The court of appeals found on examination a completely one-sided record, one containing no substantial or affirmative reason for retaining the case in the transferor court and replete with compelling reasons for removing the case to the transferee court. Not only is venue admitted in the proposed transferee forum but, so far as the record shows, the acts allegedly constituting the crimes charged in the indictment actually took place there; it is the district in which defendant's home offices are located and

where its operations are centered; key executives, counsel, and large numbers of the prospective witnesses are there and it will also be a more convenient forum for those who are not; transfer to that forum will save defendant a minimum of $100,000 in trial expense and will avoid serious disruption of its normal business activities in the period before and during what must necessarily be a long and extremely complex trial. At the same time the case is one having virtually no connection, other than a still problematical and certainly technical showing of venue, with the district in which the government chose to bring it; the record shows no act contributing materially to proof of the crimes alleged in the indictment which took place there and no prospective witness who can be found there.

Indeed, the uncontroverted facts of this record, as the appellate court found, weigh so overwhelmingly on the side of transfer that the "interest of justice", the essential and sole criterion of Criminal Rule 21(b), requires transfer as a matter of law. Yet petitioner refused to take "at face value" (R. 237) defendant's overwhelming and detailed showing of convenience for all concerned in the transferee forum and, by accepting in its place unsubstantiated assertions based largely on assumptions of guilt and defendant's income and assets, has held defendant to an absolutely insurmountable burden of proof under Rule 21(b).

ARGUMENT

At stake in this criminal case is the right of all who are accused of crime to freedom from abuse of discretion and of power in the denial of transfer under Criminal Rule 21(b). That rule makes it *mandatory* that a district court, on motion of the defendant, transfer a criminal case when venue lies in the proposed transferee forum and transfer will serve the "interest of justice" (*supra*, p. 3). Basic purposes motivating the adoption of the rule were the prevention of abuses inherent in allowing the government an absolute right to choose the forum in multi-venue criminal cases and the implementation in those cases of the public policy favoring trial in the defendant's home district having venue. These purposes have been frustrated by petitioner's decision which, in effect, renders Rule 21(b) unavailable to this defendant.

For petitioner usurped the power of a sister court and abused and refused to exercise the discretion vested in him by Rule 21(b) by speculating on the ability of another federal court to ensure the government an impartial jury; by deeming "irrelevant" the "constitutional concern" favoring trial in the defendant's home district; by ignoring the sworn, detailed, and uncontradicted record evidence and by crediting in its stead unsubstantiated avowals and the advocacy of a presumption of defendant's guilt and of a dual standard that would deny justice on the basis of wealth. Accordingly, although the decision of the court of appeals to issue its writ of mandamus rests as it must on the record-facts, the case is one that has far-reaching implications for

the administration of justice under Rule 21(b). To hold that mandamus is not available to correct abuse of this magnitude would be to sanction the flouting of the rule by the district courts and thus to endanger the rule's continued vitality as a "valuable tool of justice". *United States* v. *Cores*, 356 U.S. 405, 410 (1958).

I.

THE ALL WRITS ACT GIVES THE COURTS OF APPEALS DISCRETIONARY POWER TO REMEDY ABUSES OR USURPATIONS OF POWER PERPETRATED IN THE APPLICATION OF CRIMINAL RULE 21(b).

"[S]upervisory control of the District Courts by the Courts of Appeals", this Court has affirmed, "is necessary to proper judicial administration in the federal system." *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260 (1957). That "supervisory control," the *LaBuy* opinion made clear, is provided for in "the All Writs Act [which] confers on the Courts of Appeals the discretionary power to issue writs of mandamus in . . . exceptional circumstances. . . ." *Id.* at 260. Inherent in this general power, established from the time of Chief Justice Marshall's opinion in *Ex parte Crane*, 30 U.S. (5 Pet.) 190, 192-194 (1831), is the power to assure the proper and uniform application of rules of this Court. Especially should mandamus be available to correct a clear "abuse of discretion," which concerns " 'the enforcement of the . . . rules which by law it is the duty of this Court to formulate and put in force . . . ' " *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 256-260 (1957); *Los Angeles Brush Mfg.*

Corp. v. *James*, 272 U.S. 701, 706 (1927); *McCullough* v. *Cosgrave*, 309 U.S. 634 (1940).[7]

This case involves a refusal to transfer a criminal case under Criminal Rule 21(b) so seriously abusive as to threaten the Rule's continued usefulness as a "valuable tool of justice." *United States* v. *Cores*, 356 U.S. 405, 410 (1958). When a rule has "been practically nullified by a district judge" an appellate court should "not hesitate" to "use its power of mandamus . . . and deal directly with the District Court in requiring it to conform [with the rule] . . ." *Los Angeles Brush Mfg. Corp.* v. *James*, 272 U.S. 701, 706-707 (1927). Nor was the abuse here limited to an improper exercise of discretion on the basis of the record actually adduced. It included, as will be shown, an arrogation of the power of a sister court—petitioner's presumption that the transferor court could not provide a fair trial—and a refusal to exercise discretion—petitioner's admission that he deemed it "irrelevant" that transfer was asked to defendant's home district (P.B. 31) when a purpose of Rule 21(b) was to make such transfers possible.

Moreover, the abuse here is one for which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947). Even petitioner admits the virtual impossibility of upsetting an unfavorable verdict after trial because of his denial of transfer (P.B. 21). And, whatever the verdict, an appeal after trial can in no way compensate for the

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[7] *LaBuy* distinguished Bankers Life and Cas. Co. v. Holland, 346 U.S. 379 (1953) on the basis that it "did not concern rules promulgated by this Court but, rather, an Act of Congress . . ." 352 U.S. at 257.

expense and inconvenience of a trial that, in the interest of justice, should have been held elsewhere. It was to obviate unjustifiable expense and inconvenience that the transfer rule was adopted.[8] But a new trial, the only remedy that regular appeal might offer defendant, obviously could not compensate for the hardships the rule was meant to alleviate but would instead compound them.

The petition for certiorari concedes that the use of mandamus here was warranted; petitioner quarreled only with the writ's terms (Pet. 2, 12, n. 2; P.B. 2, 14, 17). Nevertheless, petitioner's brief on the merits apologetically draws attention to what it terms the "unsettled and troublesome question whether the writ of mandamus is ever available to review a district court's alleged 'abuse of discretion' in ruling on a Rule 21(b) motion" (P.B. 22). Although petitioner properly suggests that he may now be barred from raising this question on its merits (Supreme Court Rule 40-1(d)(2)), he urges in his brief the untimely suggestion that the court was without power to issue a writ as tending to show what the writ's terms should have been (P.B. 22).

What petitioner really suggests is a rule that would assure the district courts that transfer decisions that flout the interest of justice—and indeed go so far as to usurp the functions of a sister court—will henceforth be unassailable. This Court has, however, carefully refrained from making blanket rules that would exempt whole categories of judi-

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[8] See, *e.g.*, United States v. National City Lines, Inc., 7 F.R.D. 393, 402 (S.D. Cal. 1947). Indeed, Rule 2 of the Federal Rules of Criminal Procedure provides that all the criminal rules "shall be construed to secure . . . the elimination of unjustifiable expense. . . ."

cial decisions from appellate supervision and has instead insisted on the *ad hoc* exercise of the extraordinary powers bestowed by the All Writs Act. As the Court explained in *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25-26 (1943):

> "The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the [appellate] court. [Cases cited.] Hence the question . . . is not whether the court below had power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power."

The Seventh Circuit has demonstrated its understanding of the nature of the discretion so granted it. Recognizing that the All Writs Act provides for "extraordinary causes", it has "been slow to resort to" these writs and "unwilling to allow their use as a substitute for appeal." *Atlass* v. *Miner*, 265 F. 2d 312, 313 (7th Cir. 1959), *aff'd* 363 U.S. 641 (1960). It has refused to issue such writs to correct mere error and has emphasized that extraordinary writs are justified only on a strong showing of abuse of discretion. *A. C. Nielsen Co.* v. *Hoffman*, 270 F. 2d 693 (7th Cir. 1959); *Sypert* v. *Miner*, 266 F. 2d 196 (7th Cir.), *cert. denied* 361 U.S. 832 (1959).[9]

[9] Indeed, this Court has asserted that its examination of the Seventh Circuit's exercise of discretion under the All Writs Act "leads us to the conclusion that the Court of Appeals has exercised commendable self-restraint." LaBuy v. Howes Leather Co., 352 U.S. 249, 257 (1957). An examination of the Clerk's Memorandum Book for the court of appeals shows that between January 1, 1957 (LaBuy was decided by this Court on January 14, 1957) and October 17, 1963, writs of mandamus and/or prohibition were sought in 92 instances and were granted in only eight instances, including this case.

Petitioner's new-found doubt arises from arguments in the government's brief in *Van Dusen* v. *Barrack*, No. 80, October Term 1963, involving construction of a statute, not a rule of this Court. The thrust of the government's argument in *Van Dusen* is that mandamus should not have been used where the broader remedy provided by the Interlocutory Appeals Act had not been attempted. Traditionally mandamus is available only "when no other remedy will suffice. . . ." *DiBella* v. *United States*, 369 U.S. 121, 125, n. 4 (1962). Accordingly, to the extent that situations traditionally considered appropriate for mandamus may now be open to regular and immediate review, extraordinary writs may in practice be used even more sparingly in civil cases.

But the provision for regular interlocutory review in *civil* cases cannot affect the availability of extraordinary writs in *criminal* cases where the writ is the only available remedy. The Interlocutory Appeals Act, opening as it does to immediate review a sizable number of interlocutory decisions formerly reviewable only after final judgment, hardly indicates a strengthening of the final judgment rule. Defendant does not suggest that this substantial encroachment on the final judgment rule in civil cases merits expansion of the number or character of the criminal cases in which extraordinary writs would be appropriate, but neither does it dictate their contraction. As a general rule, the public has an interest in the speedy disposition of criminal cases and, therefore, in strict application of the final judgment rule. But in the realm of the extraordinary case to which the All Writs Act applies, the appellate courts should be particu-

larly reluctant to countenance abuse affecting the procedural protections of defendants in criminal cases, "matters that touch closely the fair administration of criminal justice and public confidence in it . . ." and are among the most cherished heritages of our law and form of government. *United States* v. *Johnson*, 323 U.S. 273, 276 (1944).

Accordingly, defendant submits that it is settled that the appellate court here had the *power* to issue a writ of mandamus. Ordinarily, the question is simply "whether . . . [this] case was an appropriate one for the exercise of that power." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25-26 (1943). Here, however, it is the still more limited issue proposed by petitioner, whether the properly issued writ should have remanded rather than ordering transfer (P.B. 2).

II.

PETITIONER USURPED THE POWER OF A SISTER COURT WHEN, CITING FACTS TRUE OF ANY SUBSTANTIAL CORPORATE DEFENDANT IN ITS HOME DISTRICT, HE DENIED TRANSFER BECAUSE THE GOVERNMENT MIGHT NOT OBTAIN A FAIR TRIAL.

As the court of appeals found (R. 240), the "most important" factor in petitioner's denial of transfer was his determination that "it would be more difficult [for the Government of the United States] to get a fair and impartial jury in the [transferee] . . . district" (R. 227), a determination that the court of appeals held to be an improper speculation about the ability of a federal court of concurrent jurisdiction to provide a fair trial (R. 247).

Petitioner's "fair trial" ruling was particularly ironic because it was based not on facts in any way peculiar to the case but on facts that should instead have influenced him to grant the transfer motion. Petitioner candidly pointed to facts that would be true of any substantial corporation in the area of its home offices, to the unsurprising presence of "many" employees and stockholders in the area of defendant's home offices and their participation, as individuals, in civic affairs and their other "contacts" (R. 227; *supra*, pp. 12-13). The court of appeals, paraphrasing this Court's decision in *United States* v. *Johnson*, 323 U.S. 273, 276 (1944), held that the decision thus "ignored" the "underlying spirit of the constitutional concern for trial in the vicinage of the defendant . . ." (R. 243). Moreover, an essential purpose of Rule 21(b) was "to further the policy of affording defendants a right to a trial at . . . [their] home base." *United States* v. *Cashin*, 281 F.2d 669, 675 (2d Cir. 1960); *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 398 (S.D. Cal. 1947). But petitioner, as his brief to this Court points out (P.B. 31), held this "constitutional policy" to be "irrelevant"; indeed, he acted in direct contravention of it when he refused transfer to defendant's home district merely because it was home.

A. Petitioner usurped the power of a sister court when he presumed to appraise or speculate on the efficacy of its operation and its ability to provide a fair trial.

The court of appeals (R. 247), including the dissenting judge (R. 252), and the petition for certiorari (Pet. 12, n. 2) agree, in accordance with the settled law, that a

district judge may not speculate as to whether another federal district court can assure a litigant a fair trial. To do so, the Court of Appeals for the District of Columbia has stated, "would be an act of unwarranted arrogance" and would amount to an assertion of "power to hear and determine the faithfulness to duty of a sister court . . . [over which] we have not the slightest semblance of authority . . ." *Johnson* v. *Mathews*, 182 F.2d 677, 681 (D.C. Cir.), *cert. denied* 340 U.S. 828 (1950); *accord, Chicago, R.I. & Pac. R.R.* v. *Igoe*, 212 F.2d 378, 382 (7th Cir. 1954); *Carbide & Carbon Chem. Corp.* v. *United States Industrial Chem., Inc.*, 140 F.2d 47, 49 (4th Cir. 1944); *Patterson* v. *Louisville & N. R.R.*, 182 F. Supp. 95, 99 (S.D. Ind. 1960); *Early & Daniel Co.* v. *Wedgefield, Inc.*, 164 F. Supp. 414, 415 (M.D.N.C. 1958).

It was just such a usurpation of power for petitioner here to give effect to his "belief of a difficulty which might be encountered in procuring unprejudiced veniremen . . . [by] a refusal to make a transfer otherwise proper under Rule 21(b)," the Seventh Circuit found, "because no court is in a position to pass upon the qualification of jurors, except by considering their *voir dire* examination" (R. 244). See *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961); *Beck* v. *Washington*, 369 U.S. 541, 557 (1962); *Blumenfield* v. *United States*, 284 F.2d 46, 51 (8th Cir. 1960), *cert. denied* 365 U.S. 812 (1961); *United States* v. *Kline*, 205 F. Supp. 637, 640 (D. Minn. 1962). And the court noted that it had "been cited to no federal case . . . holding . . ." that "when venue exists in both . . . [forums], it is permissible for

a district court in Illinois to make a determination in the 'interest of justice' under Rule 21(b) to the effect that it would be difficult for the government to procure a fair trial in the District of Minnesota" (R. 243).[10] "It follows," the Seventh Circuit held, that "no order *in any way* based upon such reasoning can stand, even under the guise of an exercise of discretion" (R. 247).

Petitioner, in his petition and in his brief on the merits, admits that it was "impermissible to take into account the *difficulty* of assembling an unbiased jury" (Pet. 12, n. 2; P.B. 26). Indeed, petitioner has admitted that this mistake was in itself of sufficient seriousness to warrant the appellate court's issuance of the extraordinary writ of mandamus: the question petitioner actually presented to this Court in his petition and again in his brief, the only question that this Court has agreed to review, challenges the *terms* of the writ but *not its use* (Pet. 2, 12-15; P.B. 2, 17).

But in his brief petitioner for the first time suggests that he "may have been [considering only that] it might take longer and be more arduous to select a proper jury" in

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[10] The court of appeals distinguished the cases relied upon by petitioner which involved situations in which the transfer was ordered, at the defendant's request, because *the defendant* could not obtain a fair trial *in the transferor court*. If noted, for example, that in United States v. Hoffa, 205 F. Supp. 710, 722 (S.D. Fla. 1962), cited by petitioner in support of his "fair trial" ruling (R. 227), the court "was passing upon conditions in the district of the court . . . making the transfer. It did not assume to pass upon whether a court in another judicial subdivision would or might be able to procure a fair jury or grant a fair trial." (R. 243)

Minnesota (P.B. 29).[11] The record does not support this claim.

The introduction of the "fair trial" issue at the oral argument by petitioner's own questions is detailed at pages 5-7, *supra*. His doubt that "an impartial jury" could be obtained in Minnesota because of the prevalence of defendant's "fellow sympathizers" there reveals his train of thought at its inception (R. 128). And certainly petitioner did not ignore the unequivocal arguments made to him by government counsel, summarized in this assertion: "I challenge where any court would decide that the Government can get a fair trial in Minneapolis or St. Paul" (R. 178).

In his opinion petitioner concluded that "there *might* exist a very severe influence on *any* citizen in the area called for jury service . . .," an influence that "would probably make itself felt [even] among the citizens in the counties adjacent to [those in which Minneapolis and St. Paul are located]" (R. 227). To counteract this "severe influence", the government, he noted, has "but three peremptory challenges" (R. 227). These facts, "material" to the conclusion that "it would be more difficult to get a fair and im-

[11] Defendant does not, of course, concede that this would have been a proper consideration. In any event, it is inconceivable that this kind of difficulty in selecting a jury, even assuming that it might exist, would cause any substantial delay, anything more than a matter of hours, or at most, days. We know of no case suggesting that this kind of delay, or the effort of court and counsel that might be involved in it, is of sufficient importance to warrant consideration under Rule 21(b) (still less to warrant denial of transfer under that rule), and petitioner cites none.

partial jury in . . ." Minnesota (R. 227), are incompatible with any conclusion other than that reached by the court of appeals, that petitioner "believed that there was a *likelihood* of the government not receiving a fair jury trial in Minnesota" (R. 244). Certainly, peremptory challenges have nothing to do with delay or arduousness in obtaining a jury; their limited number would indicate the opposite. Rather the reference reveals petitioner's concern that the government would not be able to purge the jury panel of people sympathetic to defendant.

The answer to the rule to show cause reasserted "that it would be more difficult for the Government to obtain an impartial jury" (R. 234-236), and petitioner made his meaning clear in a 53-page supporting brief (Brief for Petitioner [respondent below] in the Court of Appeals for the Seventh Circuit).[12] Only a belief that it was probable that any Minnesota jury would be prejudiced against the government can explain his argument that transfer should have been denied because "the Government would be without remedy upon a judgment of acquittal . . ." rendered by a biased jury in Minnesota (*id.* at 40-42). Indeed, petitioner went so far as to assert to the court of appeals that selecting "talesmen . . . from distant counties does not eliminate the problem, *for even assuming they were free of influence when called,*

[12] Only the answer to the rule to show cause has been printed. The supporting brief, which became relevant only when this issue was raised in petitioner's brief on the merits to this Court, is part of the record in this Court, certified copies having been filed with the petition for certiorari.

they would nonetheless be subject daily to the local atmosphere at the court site after selection" (*Id.* at 42, n. 9).

After the court of appeals entered its opinion, petitioner did not ask for rehearing. Instead his petition for certiorari expressly conceded the "correctness" of the court of appeals' finding and disavowed any wish to have this Court review it (Pet. 12, n. 2). Even after having decided to raise the question (one clearly barred by Supreme Court Rule 40-1(d)(2)), the brief on the merits does not assert that the Seventh Circuit did *in fact* misunderstand petitioner's position but merely that petitioner's opinion may be susceptible on its face to an interpretation less serious than the one uniformly given it even in the petition for certiorari. And this afterthought is urged as a reason for this Court to change the terms of the Seventh Circuit's writ of mandamus from the provision for immediate transfer, which the court of appeals in its discretion deemed necessary, to a provision for remand—to the end that petitioner might have another opportunity to rule on the transfer motion.

Thus the history of this issue, from the time of its introduction by petitioner at his hearing on the transfer motion to the time of his confession of abuse meriting mandamus in the petition, shows that its consideration is barred at this time and that, even if it were not, the suggestion that the court of appeals misunderstood petitioner's position on the fair trial issue is unsupportable.

B. Petitioner abused his discretion when he refused to give any weight to the "constitutional concern" that those accused of crime be tried, when possible, at home.

When the court of appeals pointed out that "this criminal case is impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district . . ." (R. 248), it was not concerned with the problem of determining where the crime was committed because venue in the transferee forum was stipulated. The problem was not whether trial *could* be held in either forum but the derivative problem of determining where the trial *should* be held in the interest of justice.[18] It is difficult to understand, therefore, why petitioner's discussion of the "home district" question concentrates on an irrelevant discussion of defendant's constitutional right to be tried where the crime was committed. Defendant does not ask for a trial where the crime was not committed but for trial in its home district where venue admittedly lies.

Rule 21(b) was promulgated in order to withdraw what was once the government's absolute right to choose the forum in multi-venue cases and to allow courts, on

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[18] The cases cited by petitioner on this point (P.B. 33), In re Palliser, 136 U.S. 257 (1890) and Johnston v. United States, 351 U.S. 215 (1956), are cases that deal exclusively with the question of venue, i.e., where the trial *could* be held and not with the relevant problem of where the trial *should* be held when it could be held in more than one place.

the motion of a defendant, to transfer criminal cases in accordance with "the interest of justice". Certainly the interest of justice should take into account the "policy of relieving the accused, where possible, of the inconvenience incident to prosecution in a district far removed from his residence" (*United States* v. *Cores*, 356 U.S. 405, 410 (1958)) which has ancient origins in the common law and is, most particularly, foundational to American legal traditions.

As Mr. Justice Douglas has cogently demonstrated, the history of the constitutional provisions guaranteeing those criminally accused a right to trial where the crime was committed shows that a basic concern of the framers of the Constitution was to guarantee to each defendant a trial at home. The Declaration of Independence cited among the wrongs wrought by George III those "depriving us . . . of the benefits of Trial by Jury [and] . . . transporting us beyond the Seas to be tried . . ." and the reference was to the proposal by Parliament that Americans be tried abroad or in other American colonies for crimes committed in their own colonies, about which "the Virginia Resolves of May 16, 1769, voiced the unanimous view that 'thereby the inestimable Privilege of being tried by a Jury from the Vicinage, as well as the Liberty of summoning and producing Witnesses on such Trial, will be taken away . . .'" *Johnston* v. *United States*, 351 U.S. 215, 224 (1956) (Mr. Justice Douglas dissenting), cited with approval by the Court in *United States* v. *Cores*, 356 U.S. 405, 410 (1958). A modern commentator has explained:

"[T]he term 'vicinage' as used by the colonists in their struggle with England did not refer to the neighborhood of the crime or even to the county in which the crime was alleged to have been committed. By insisting on a right to a jury of the vicinage the colonists hoped to escape the hardship and danger of standing trial in some distant colony or in England. In the Declaration of Independence the King was condemned, not for interfering with the jury of the vicinage as known to Coke, but 'for transporting us beyond Seas to be tried for pretended offences.'" (Blume, *The Place of Trial of Criminal Cases*, 43 Mich. L. Rev. 59, 65-66 (1944).)

Indeed, in his definitive work on the Constitution, Mr. Justice Story explained that, "the *object* of [the constitutional] clause [providing that the trial of all crimes is to be held where they are committed] is, to secure the party accused from being dragged to a trial in some distant state, far away from his friends, and witnesses, and neighborhood; and thus subjected to the verdict of mere strangers . . . [and possibly] to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence." 2 Story, Commentaries on the Constitution, § 1781 (4th ed. 1873).

Only in relatively modern times has it become necessary in ordinary cases to distinguish between the place of the crime and the home of the defendant. When men were less mobile and the acts subject to criminal sanction less complex, the guarantee of trial in the vicinage of the commission of the crime was generally a guarantee of trial

in the vicinage of the defendant's home. But in the years when the incidence of multi-venue crimes, based on the commerce clause and often involving charges of conspiracy, became increasingly frequent, this Court recognized the growing opportunity for abuse and oppression which resulted from allowing the prosecution an absolute right to choose the forum in multi-venue cases. In time the practice of using this "vagrant" crime of conspiracy as a basis for jurisdiction, Mr. Justice Jackson has pointed out, reduced "to a phantom" the protection that the founding fathers had intended to provide. *Krulewitch* v. *United States*, 336 U.S. 440, 452 (1949) (concurring opinion).

The Court early admonished that it did not approve "the practice of indicting citizens [in] . . . distant States . . . , where an indictment will lie in the State of the domicil of such person . . ." *Hyde* v. *Shine*, 199 U.S. 62, 78 (1905). In his dissent in *Hyde* v. *United States*, 225 U.S. 347, 384-391 (1912), Mr. Justice Holmes argued against constructions that allowed venue in places remote from the defendant's home because they would produce the "wrongs that our forefathers meant to prevent" (225 U.S. at 387).

In *United States* v. *Johnson*, 323 U.S. 273 (1944), the Court applied the rationale of the Holmes' dissent. Refusing to construe the governing statute as allowing venue in a place far from the defendant's domicile, the Court based its decision on "the underlying spirit of the constitutional concern for trial in the vicinage" which required the avoidance of statutory constructions allowing venue "in places remote from home" (*id.* at 276, 278). "Such construction," the Court held, "while not required by the

compulsions of . . . the Constitution . . . is more consonant with the considerations of historic experience and policy which underlie those safeguards in the Constitution regarding the trial of crimes . . ." (323 U.S. at 275). The Court explained that this doctrine bars "the door to needless hardship . . . by prosecution remote from home and . . . appropriate facilities for defense," and banishes "the appearance of abuses, if not . . . abuses, in the selection of . . . a tribunal favorable to the prosecution." *Ibid.* Accordingly, "if an enactment . . . equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it." *Id.* at 276.

In the face of this long history and the continued strength and viability of this public policy as shown in the decisions of this Court, petitioner's admission that he considered it "irrelevant" that the defendant here asked for transfer to its home district (P.B. 31) demonstrates the extent and seriousness of his misunderstanding of the factors relevant to the "interest of justice" under Rule 21(b). An express and specific purpose of the Rule, heretofore respected by the decided cases,[14] was to make it possible for the federal

[14] United States v. Cashin, 281 F.2d 669, 675 (2d Cir. 1960); United States v. North Am. Van Lines, Inc., 1962 Trade Cas. ¶70,283 (D.D.C. 1962); United States v. General Motors Corp., 194 F. Supp. 754, 757 (S.D.N.Y. 1961); United States v. Olen, 183 F. Supp. 212, 215-217 (S.D.N.Y. 1960); United States v. Erie Basin Metal Prods. Co., 79 F. Supp. 880, 885 (D. Md. 1948); United States v. National City Lines, Inc., 7 F.R.D. 393, 396-398 (S.D. Cal. 1947).

courts to implement this long-standing "constitutional policy" favoring trial in the defendant's home district. Indeed, this intention complemented the "very salutary" purpose of Rule 21(b) to eliminate gross injustices formerly produced by allowing the prosecution an absolute right to choose the forum in multi-venue conspiracy cases, particularly antitrust cases. 4 BARRON, FEDERAL PRACTICE AND PROCEDURE, § 2091, p. 150 (1951); Holtzoff, *Reform of Federal Criminal Procedure*, 3 F.R.D. 445, 452 (1944). Those abuses were described in relation to the policy favoring trial in the defendant's home district by Judge Medalie, a member of the Advisory Committee on Federal Rules of Criminal Procedure, as ". . . pretty shabby business for the great government of the United States to indulge in. . . . If, for example, a business' headquarters are in Chicago, everybody is there, every book and record is there, practically every witness is there on both sides, then try it in Chicago. That is the decent thing to do and accords better with the dignity of our great government. . . ." FEDERAL RULES OF CRIMINAL PROCEDURE, NEW YORK UNIVERSITY SCHOOL OF LAW INSTITUTE, PROCEEDINGS, 274-275 (1946).

This Court took cognizance of Rule 21(b)'s usefulness in effectuating "the policy of relieving the accused, where possible, of the inconvenience incident to prosecution in a district far removed from his residence . . ." in *United States* v. *Cores*, 356 U.S. 405, 410 (1958). In that case the Court construed the governing statute broadly to permit venue to lie in the defendant's home district. The government justified that interpretation on the basis that in most cases arising under the statute it would result, as it did in

the *Cores* case, in the defendant's being tried in the place of his residence, thus avoiding the "hardship" involved in trial in "a distant place where he was not residing and where he and his witnesses were complete strangers."[15] The Court in its opinion expressly pointed out that its decision would in *every* case "make . . . a valuable tool of justice [Rule 21(b)] available [to the defendant] . . .", and thus open the way for transfer of the case to the home district of the accused. *United States* v. *Cores*, 356 U.S. 405, 410 (1958).

Defendant does not argue that all who are accused of crime have an absolute right to be tried at home, nor did the Seventh Circuit so hold. But the Seventh Circuit did recognize that a purpose of Rule 21(b) is to implement the "constitutional policy" favoring trial in the home district when there is venue there and when there are no substantial reasons for having the trial elsewhere. And the Seventh Circuit was shocked, we submit rightly, by a decision that not only eschewed the policy favoring trial at home but refused transfer simply because it would result in the defendant's being tried at home.

Petitioner suggests that the appellate court viewed the policy favoring trial at home as being "so strong that it must prevail unless there are overwhelming counterbalancing factors in the particular case" (P.B. 34). The history of the policy indicates that strength. But defendant here

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[15] Brief for the United States in United States v. Cores, Docket No. 455, October Term 1957, page 21.

does not need to place such reliance on it because, as will be shown in the succeeding section, the record here is not only devoid of "overwhelming counterbalancing factors" favoring trial in the Eastern District of Illinois, but contains virtually nothing favoring trial there.

III.

THE APPELLATE COURT'S ORDER THAT THIS CASE BE TRANSFERRED FORTHWITH WAS PROPER IN THE LIGHT OF THE RECORD FACTS.

A. It was proper, and necessary, for the court of appeals to review the whole record.

Petitioner's primary contention in this Court is that the court of appeals, having "laid bare" his abuse, was obliged, without further consideration of any aspect of his decision or of the record, to issue a writ of mandamus remanding the decision to him (P.B. 26). But the same contention was recently considered and ruled upon by the Court of Appeals for the Second Circuit in *Lummus Co.* v. *Commonwealth Oil Ref. Co.*, 297 F. 2d 80, 90 (2d Cir. 1961), *cert. denied* 368 U.S. 986 (1962), in which the court, having concluded that a writ of mandamus was in order, considered the form that the writ should take: "we must now decide whether we should . . . limit our decision [to vacate an order insofar as it was based on an improper consideration] *or should also pass upon the other issues* . . . to the full extent the record will permit, although we might not have considered mandamus if they had stood alone."

297 F. 2d at 90. The court concluded that it could "lawfully pursue either course," but that it was preferable for it to review the entire record in order to prevent further delay, and because "we see no purpose in a [remand] . . . , when all material needed for . . . disposition is before us, and, in our view, any determination in [respondent's] favor by the District Court would ultimately have to be reversed as erroneous in law." 297 F. 2d at 90.

The problem posed to the Seventh Circuit was parallel, although, rather than being one of two equally lawful alternatives, remand here would have been a dubious solution. As mandamus is "reserved for really extraordinary causes", such as "where appeal is a clearly inadequate remedy . . ." (*Ex parte Fahey*, 332 U.S. 258, 260 (1947)), the issuance of an extraordinary writ would not have been justified if, despite the abuse, the ultimate denial of transfer was correct or at least supportable on the basis of the record as a whole. In order to be certain that the writ was necessary to correct an otherwise irremediable abuse of discretion, the court of appeals had a duty to look at the whole record.

Furthermore, this was not a situation like the one considered in, for example, the first *Igoe* case (*Chicago, R.I. & Pac. R. R.* v. *Igoe*, 212 F.2d 378 (7th Cir. 1954)), upon which petitioner relies (P.B. 30), a case in which the trial court's decision rested solely on consideration of the improper factor and the relevant factors had not been considered at all. Here, on petitioner's initiative, the entire record was urged to the court of appeals as justification for a decision involving error so serious as to constitute abuse of discretion. Indeed, petitioner argued that the record apart

from the "fair trial" factor did support his denial of transfer.[16]

Instead, the law applicable here is found in the second *Igoe* case, decided after the district judge, on remand, again denied the motion, this time on the basis of the record as a whole. The court of appeals then examined the record and found that the case was brought in a district which had "no relation to the litigation . . .", whereas "the balance of convenience of the parties" was "so overwhelmingly in favor of the defendant that . . . the denial . . . of the motion to transfer . . . amounted to an abuse of discretion." *Chicago, R. I. & Pac. R. R.* v. *Igoe*, 220 F. 2d 299, 304, 305 (7th Cir.), *cert. denied* 350 U.S. 822 (1955). Accordingly, the court by mandamus directed the district judge to transfer the action. As to the statement in its earlier decision quoted at P.B. 30, the court explained, "all we intended to say was that the District Court must, *initially*, make the decision *by applying the statutory tests* . . ." 220 F. 2d at

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[16] Extraordinary writs are to be used to accomplish the ends of justice, not to impose empty procedural routine, and any court evaluating realistically the arguments petitioner made to the Seventh Circuit would realize that remand in this case would be tantamount to denial of transfer. Petitioner argued that, irrespective of the fair trial issue, "once the trial court determined that defendant would obtain a fair trial in the Eastern District of Illinois and concluded that defendant had not established that trial in that district would subject it to such serious inconvenience and disruption of business so as to require transfer in the 'interest of justice'. . . , it could, without more, refuse to transfer the cause." Brief for Petitioner [respondent below] in the Court of Appeals for the Seventh Circuit, page 42. His petition for certiorari states that "there is every indication that even had petitioner altogether excluded . . . the 'impartial jury' point, he would still have denied transfer" (Pet. 13).

302. "We thought we clearly delineated the scope of our [earlier] decision," the court added, "when we stated: 'However, this opinion deals with the existence of power [to issue the writ] only, not with the permissible limitations on its exercise.'" *Ibid.*

United States v. *Johnson*, 327 U.S. 106 (1946), on which petitioner relies, is not in point. The denial of a new trial in that case, which was appealed in the ordinary and regular way, presented a pure question of fact: did the witness Goldstein lie? Credibility questions, especially where as in *Johnson* the demeanor of witnesses is taken into consideration, are always reserved to the trial court. But this case involves a completely documentary record, one which petitioner would have no special advantage in evaluating even if it involved conflicting facts. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-396 (1948). Here the basic facts are admitted or uncontradicted, and the appellate court did not reject any finding of fact made by petitioner—saving only the finding that the government could not obtain a fair trial in Minnesota. In any case the "effect of admitted facts is a question of law." *Nelson* v. *Montgomery Ward Co.*, 312 U.S. 373, 376 (1941); see also *Exmoor Country Club* v. *United States*, 119 F. 2d 961, 963 (7th Cir. 1941). Their evaluation under Rule 21(b) involves only the application of legal standards to determine the purely legal question of the interest of justice.

But even if we were to assume that the *Johnson* case was relevant here, it is difficult to see how it would justify remand prior to examination of the record. *Johnson* certainly

authorizes reversal of even the simplest fact finding if it is unsupported, but it is impossible to tell whether it is unsupported without looking at the record. Indeed, petitioner concedes that the appellate court's action here was correct if "it is clear that without considering the improper factor the district court would have no alternative but to transfer" (P. B. 34). This could be determined only by looking at the record.

B. The record so overwhelmingly shows that transfer will be in the interest of justice as to compel transfer under Rule 21(b) as a matter of law.

When the court of appeals examined the documents which comprise the record in this case, it found no reason for holding the trial in Danville. On the contrary, the court found that "without considering the improper factor the district court would have no alternative but to transfer" (P.B. 34), for its study of the record revealed a "demonstration *by proof or admission* of the essential elements of convenience, expense and early trial" constituting the interest of justice which compels transfer under Criminal Rule 21(b) (see p. 16, *supra*). Thus the court of appeals' conclusion is not a set of *de novo* findings of fact, as petitioner's brief argues, but a conclusion of law based on an uncontroverted record.

So far as the record shows, the events put in issue by the indictment did not take place in the Eastern District of Illinois, and there is no dispute that venue, when and if it is laid, will be technical (see pp. 12, n. 4, 13, *supra*). Not only does the documentary record fail to detail events tying

the case to the Danville district, but the government attorneys, although they used the hearings as an opportunity to outline their entire case on the merits to petitioner, did not allege that any event that would tend to prove the essential elements of the crimes charged in the indictment took place in the Eastern District of Illinois. So tenuous were their suggested bases for venue (see p. 12, n. 4, *supra*) that petitioner felt compelled to take cognizance of the questionable status of the government's ability to establish venue in his district by observing that "defendant would not suffer if the Government should fail to prove venue, because the indictment or counts in the indictment so affected would have to be dismissed" (R. 223).

The record shows (*supra*, pp. 11-12), moreover, that neither defendant nor any named co-conspirator or known witness on the merits is to be found in the Eastern District of Illinois, nor are counsel (except for defendant's local counsel whose services would be obviated by transfer) located there. The documents the government has sent there, which so far as the record shows form Danville's only material link with this case, have already done considerable traveling and, packed as they are in nine ordinary-sized file boxes, can be removed to Minnesota at a cost of less than $50 (R. 73). See *United States* v. *Olen*, 183 F. Supp. 212, 219-220 (S.D.N.Y. 1960).

On the other hand, the record shows the District of Minnesota, the proposed transferee forum, to be the place where in all probability the events that will be determinative of the issues involved in the indictment really took place (pp. 8-9, *supra*). It is the center of defendant's operations,

the place where its research is done, its policies formed, its records kept, its many key personnel and its general and patent counsel located, and many of the witnesses defendant will call live and work there (p. 8, *supra*). The record shows beyond cavil the markedly greater convenience of the St. Paul-Minneapolis area to all witnesses—those named as co-conspirators, the witnesses defendant intends to call, and the grand jury witnesses who, presumably, will form the nucleus of the government's witnesses at the trial (see p. 10, *supra*).

The indictment, culminating an investigation that continued over a period of seventeen years (R. 42, 138), puts in issue virtually every facet of the development and sale of three major products. It is undisputed that the trial of these factually and legally complicated issues will necessitate a tremendous commitment by defendant of time, personnel, and money; trying the case in Danville, rather than in one of the Twin Cities, will increase its dollar cost to defendant by at least $100,000 (R. 75). Involving as it does those who have determined defendant's policies and have carried them out over a thirty-year period, the trial itself, as the undisputed record facts here show, will "require the attendance over a period of months of [many of defendant's] . . . key men . . ." and, if held in Danville, "would result in a complete dislocation of its business at the place where it can least afford it—*at the central place of control.*" *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 400 (S.D. Cal. 1947); see pp. 9-10, *supra*.

If ever there was a case that illustrated the basic reason for the adoption of Rule 21(b) (see pp. 39-40, *supra*), the record here presents it. Multi-venue antitrust conspiracy cases brought, for whatever reason, in forums with which they have no real connection motivated the drafting of Rule 21(b). See, *e.g.*, FEDERAL RULES OF CRIMINAL PROCEDURE, NEW YORK UNIVERSITY SCHOOL OF LAW INSTITUTE, PROCEEDINGS, pp. 168-170, 224-225, 274-275 (1946). Judge Medalie pointed out that "if . . . the crime has been . . . claimed to have been committed in more than one district," Rule 21(b) makes it possible—indeed mandatory—that "the judge in the [transferor] district . . . order . . . the trial in the district *where it is most convenient* that the case be tried. If for example"—and in this illustration we substitute "St. Paul" for Judge Medalie's hypothetical "Chicago"—"a business' headquarters are in [St. Paul], everybody is there, every book and record is there, practically every witness is there on both sides, then try it in [St. Paul]."

Particularly should the purpose of the rule be respected in a case of this magnitude where quick and convenient access to the client's many interested officers and employees, and to the voluminous records that are or may become relevant, has an importance to the quality of the defense that cannot be overestimated. As Judge Tehan pointed out in the *American Natural Gas* case: "No one who has had experience in protracted litigation involving important stakes such as are involved here can be at all realistic

and not recognize the need and value of close contact between clients, officers of corporations, and records, and attorneys immediately prior to and during the course of the trial." *United States* v. *American Natural Gas Co.*, 1959 Trade Cas. ¶ 69,265 at p. 75,034 (E.D. Wis. 1959); see also *United States* v. *General Motors Corp.*, 194 F. Supp. 754, 756 (S.D.N.Y. 1961). It is clear on this record that trial in Danville "would impose unnecessary hardships . . . and entail unjustifiable expense which it is the object of . . . [Rule 21(b)] . . . to avoid." *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 402 (S.D. Cal. 1947).

The one-page summary (P.B. 6-7) of the government's bases for opposing the transfer motion reveals three completely unsubstantiated assertions: (1) that Danville was a more convenient forum than St. Paul for an undisclosed number of unidentified government witnesses; (2) that defendant is not only guilty but continues to engage in illegal activity and therefore must be speedily tried in Danville; and (3) that the serious hardship that trial in Danville will impose on defendant need not be considered because defendant has in the past demonstrated its ability to participate in less complicated civil litigation away from home and, more important, because defendant's income and assets are substantial enough to foreclose the possibility that the added cost of an adequate defense in Danville will result in bankruptcy. That petitioner treated these contentions seriously, while admittedly refusing to take "at face value" (R. 237) the carefully documented facts on which defendant based its showing that justice would be served

by transfer, is a measure of the extent of the abuse perpetrated in petitioner's denial of transfer.

(1) In answer to defendant's detailed accounting of every known witness, government counsel merely averred that "a 'substantial number' of the government's prospective witnesses live within a 300-mile radius of Danville, while only one or two minor witnesses live within 300 miles of St. Paul-Minneapolis" (P.B. 7). The arbitrary selection of a 300-mile radius brings Chicago, where two named co-conspirators and six probable witnesses are located (R. 77), into the proposed Danville area but leaves it out of the Twin Cities area. Thus the government's assertion reveals that it has no witnesses in the Eastern District of Illinois and supports the inference that it has no substantial number of witnesses closer to Danville than Chicago. Moreover, it is beyond dispute that it is easier to get to St. Paul than to Danville from Chicago, even though the distance in miles is somewhat greater (R. 78-79, 82-85; see p. 10, *supra*).

The legal effect of petitioner's determination, which allowed this bare assertion to outweigh defendant's detailed evidence, is to impose upon a defendant seeking transfer an insurmountable burden of proof. The government may resist pretrial discovery in a criminal case, but the consequence of using that right as an excuse for failure to disclose facts material and necessary to rebut an overwhelming contrary showing under Rule 21(b) can and should be the granting of the transfer motion. *Cf. United States v. Gerber*, 86 F. Supp. 175, 178 (E.D. Pa. 1949).

(2) While relative docket conditions may be pertinent to a transfer motion when one docket is congested and the other not, they are not so when, as here, the dockets in both courts are current—especially when the record otherwise overwhelmingly favors one forum over the other (R. 248, 48; see pp. 10-11, *supra*). There was no factual disagreement between the district and appellate courts on this point. Certainly an appellate court, with its broader administrative and supervisory experience, can evaluate the comparative status of the dockets in the two forums. The decision of the court of appeals shows, moreover, its disapproval of the special handling of the case which petitioner clearly proposed (see p. 15, *supra*),[17] and its approval of the average case load statistics as the significant ones (see pp. 10-11, 11, n. 3, *supra*). Furthermore, petitioner's concern that the case be tried immediately, based as it was on government counsel's completely unsubstantiated "avowal" of continuing guilt (R. 236), denied defendant the fundamental presumption of its innocence. See *United States* v. *White*, 95 F. Supp. 544, 548 (D. Neb. 1951).

(3) The emphasis in petitioner's opinion on defendant's ability to undertake the hardship that a Danville trial would impose stems from his initial error, consideration of the "fair trial" issue as determinative. He discussed the re-

[17] Petitioner's assertion in his answer to the rule to show cause that transfer would delay the trial of this case for a year (R. 236) can only mean that this case, taking its normal place on a current docket, would not come to trial for a year (R. 99)—whereas petitioner would have tried the factually voluminous and legally complex issues created by the indictment immediately (R. 226).

mainder of the record in terms of *justifying* the decision made on other grounds (R. 221-226, 235-237; see pp. 13-14, *supra*); his attempt was to demonstrate that defendant *could* be adequately represented in Danville rather than that the trial *should* be held there in the interest of justice. The essential reason for petitioner's conclusion that an adequate defense was *physically possible* in Danville was, as the government argued, that "in view of the defendant's . . . gross sales . . . and earnings . . . there was no danger that the added expense of trial in Danville would impair the quality of the defense" (P.B. 7). But the interest of justice under Rule 21(b) does not incorporate a dual standard which would make it unavailable to defendant, for it applies:

> ". . . whether the defendant be poor or rich, a small or large corporation. Neither the rules nor our system would justify the elimination of any of these elements merely because the defendants, or some of them, may be persons of great wealth or corporations with large resources." *United States* v. *National City Lines, Inc.*, 7 F.R.D. 393, 398 (S.D. Cal. 1947).

CONCLUSION

For the reasons stated, defendant respectfully requests that the decision of the court of appeals be affirmed.

Respectfully submitted,

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